160 U.S. 469

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~986.~~ 893

DENNIS DAVIS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED APRIL 13, 1895.

(15870.)

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a In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court in case of—

UNITED STATES
vs.
DENNIS DAVIS. } Indictment for murder. No. 95.

1 *Indictment.*

United States of America, western district of Arkansas. In the circuit court, Aug. term, A. D. 1894.

UNITED STATES
vs.
DENNIS DAVIS. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That Dennis Davis, a negro and not an Indian, on the 18th day of Sept., A. D. 1894, at the Creek Nation in the Indian country, within the western district of Arkansas aforesaid, with force and arms in and upon the body of one Sol Blackwell, a negro and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Dennis Davis with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun he, the said Dennis Davis, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against, and upon the said Sol Blackwell, and that the said Dennis Davis with the leaden bullet aforesaid, out of the gun aforesaid, then and there by force of the gunpowder aforesaid, by the said Dennis Davis discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said Sol Blackwell, in and upon the head and body of him, the said Sol
2 Blackwell, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said Dennis Davis in and upon the head and body of him, the said Sol Blackwell, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said Sol Blackwell, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Dennis Davis him, the said Sol Blackwell, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

JAS. F. READ,
United States Attorney, Western District of Arkansas.

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JAS. F. READ,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 95. United States vs. Dennis Davis. Murder. A true bill. S. A. Williams, foreman. Witnesses:

A. H. Brewer, Texanna, I. T.
John Thomas, Eufaula, I. T.
Ben Scales, " "
Dick Shaver, " "

Filed in open court Oct. 13, 1894. S. Wheeler, clerk, by I. M. Dodge, D. C.

3 *Record entries.*

In the circuit court of the United States for the western district of Arkansas, August term, 1894.

SATURDAY MORNING, 8½ *o'clock, Oct.* 13, 1894.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES
vs.
DENNIS DAVIS. } Indictment for murder. No. 95.

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and make known to the court that he is destitute of means and wholly unable to employ counsel, and asks the court to appoint counsel to defend him in this cause. Whereupon Messrs. Oglesby, Ben Cravens, Jones, and Meyer were appointed by the court as counsel for the defendant in this cause. Thereupon the defendant had hearing of said indictment, and it being demanded of him concerning said indictment above specified, and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment, and puts himself upon the country.

TUESDAY, *Oct.* 16, 1894.

(Caption omitted.)

On this day come the said defendant by his attorney and files his application, verified upon oath, praying for witnesses in his behalf at the expense of the United States.

4 WEDNESDAY, *Oct.* 17, 1894.

(Caption omitted.)

On this day come on to be heard the application for witnesses in this cause, filed Oct. 16, 1894, and the court, being fully advised in the premises, doth allow the same. It is therefore ordered that the legal expense of procuring the testimony of Rachel Davis, Edgar Davis, Wm. Alsey, and Claude Carlose, in behalf of said defendant, be paid by the United States, and that a subpœna be issued for them returnable Nov. 16, 1894.

WEDNESDAY, *Oct.* 24, 1894.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application, verified upon oath, praying for witnesses in his behalf at the expense of the United States.

FRIDAY, *Oct.* 26, 1894.

(Caption omitted.)

On this day come on to be heard the application for witnesses in this cause, filed Oct. 24, 1894, and the court, being fully advised in the premises, doth allow the same. It is therefore ordered that the legal expense of procuring the testimony of John Carlos, Nelson Coker, Brit. Jennings, and one Whitson, in behalf of said defendant, be paid by the United States, and that a subpœna be issued for them returnable Nov. 16, 1894.

NOV. TERM, 1894, *Friday, Nov.* 16, 1894.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said
5 defendant, in custody of the marshal and by his attorneys, Messrs. Oglesby, Jones, Ben Cravens, and Myers. And it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete list of the witnesses in this cause; and that he has also been served with a full and complete list of the panel of petit jurors and alternates, as selected and drawn by the jury commissioners for the present term of this court more than two entire days heretofore; and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is, on motion of plaintiff by its attorney, ordered by the court that a jury come to try the issue joined. Whereupon, after counsel for both plaintiff and defendant had exercised, in the presence of the defendant, their full right of challenge under the law, the following jurors were selected for the trial of this cause, to wit: Thos. J. Brown, Oliver G. Martin, Henry Boas, Lee K. Burt, Ambrose R. McPherson, Robt. R. McGregor, Chas. M. Carroll, Lewis H. Green, Thos. P. Ramsey, Jas. H. Richardson, Wm. S. Langston, Johnson H. Smith; twelve good and qualified electors of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined, and a true verdict render, according to the law and the evidence, and after hearing the evidence and a portion of the argument of counsel, and there not being time to further progress in the trial of this cause they were put in charge of a sworn bailiff of this court.

And it is further ordered by the court that said jury be kept together, and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

6 SATURDAY, *Nov.* 17, 1894.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Oglesby, Jones, Ben Cravens, and Myer; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit:

(Endorsed on back:) No. 95. United States vs. Dennis Davis. Murder. A true bill. S. A. Williams, foreman. Witnesses:

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NOV. TERM, 1894, *Friday, Nov.* 16, 1894.

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On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said
5 defendant, in custody of the marshal and by his attorneys, Messrs. Oglesby, Jones, Ben Cravens, and Myers. And it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete list of the witnesses in this cause; and that he has also been served with a full and complete list of the panel of petit jurors and alternates, as selected and drawn by the jury commissioners for the present term of this court more than two entire days heretofore; and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is, on motion of plaintiff by its attorney, ordered by the court that a jury come to try the issue joined. Whereupon, after counsel for both plaintiff and defendant had exercised, in the presence of the defendant, their full right of challenge under the law, the following jurors were selected for the trial of this cause, to wit: Thos. J. Brown, Oliver G. Martin, Henry Boas, Lee K. Burt, Ambrose R. McPherson, Robt. R. McGregor, Chas. M. Carroll, Lewis H. Green, Thos. P. Ramsey, Jas. H. Richardson, Wm. S. Langston, Johnson H. Smith; twelve good and qualified electors of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined, and a true verdict render, according to the law and the evidence, and after hearing the evidence and a portion of the argument of counsel, and there not being time to further progress in the trial of this cause they were put in charge of a sworn bailiff of this court.

And it is further ordered by the court that said jury be kept together, and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

6 SATURDAY, *Nov.* 17, 1894.

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On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Oglesby, Jones, Ben Cravens, and Myer; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit:

Thos. J. Brown, Oliver G. Martin, Ambrose R. McPherson, Robt. R. McGregor, Thos. P. Ramsey, Jas. H. Richardson, Henry Boas, Lee K. Burt, Chas. M. Carroll, Lewis H. Green, Wm. S. Langston, Johnson H. Smith, who took their seats in the jury box and after hearing the remainder of the argument of counsel and receiving the charge of the court, retired, in charge of the sworn bailiff aforesaid, to consider of their verdict and after a short time returned into court the following verdict, to wit:

"We, the jury, find the defendant, Dennis Davis, guilty of murder for feloniously, wilfully, and with malice aforethought, killing Sol Blackwell as charged in the within indictment."

(Signed) J. H. RICHESIN, *Foreman.*

On motion of counsel for the defendant the jury was polled, and each juror answered for himself that the verdict as read by the court was his verdict.

Whereupon by order of the court, the jury was discharged from the further consideration of the case, and the said defendant was remanded to the custody of the marshal to await final sentence.

7 MONDAY, *Dec.* 31, 1894.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his motion to set aside the verdict of the jury and for a new trial in this cause.

WEDNESDAY, *Jan.* 2, 1895.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files an amended motion to set aside the verdict of the jury and for a new trial in this cause.

SATURDAY, *Feb.* 2, 1895.

(Caption omitted.)

On this day come on to be heard the motion heretofore filed to set aside the verdict of the jury and for a new trial in this cause, and the court being well and sufficiently advised in the premises doth overrule the same.

(Caption omitted.)

On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, the said defendant Dennis Davis was brought to the bar of this court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the jury in this cause on the 17th day of November, 1894, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen and by the court well and
8 sufficiently understood, it is considered by the court that the said Dennis Davis be deemed, taken, and adjudged guilty of the crime of murder, for wilfully and of his malice aforethought killing Sol Blackwell, and it is ordered by the court that the said marshal of the district aforesaid cause the said Dennis Davis to be taken hence, and him, the said Dennis Davis, safely and securely keep from the date hereof until Tuesday the 2nd day of April, A. D. 1895, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said Dennis Davis to be taken to some con-

venient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon on Tuesday the said 2nd day of April, in the year of our Lord one thousand eight hundred and ninety-five, cause the said Dennis Davis to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended and that they have execution therefor.

And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal, with a full and true account of the execution of the same.

(Caption omitted.)

Ordered by the court that the defendant be allowed sixty days from this date in which to file a bill of exceptions in this cause.

And it is further ordered that this cause be continued to the February term of this court, 1895.

9 FEB. TERM, 1895, *Saturday, Feb.* 16, 1895.

(Caption omitted.)

On this day come the said defendant, by his attorney, Ira B. Oglesby, esq., and tenders his bill of exceptions in this cause, and asks that the same be signed and made a part of the record in this cause, which is accordingly done.

FRIDAY, *Mch.* 8, 1895.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his assignment of errors and petition for a writ of error to the Supreme Court of the United States, together with his petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States.

MONDAY, *Mch.* 25, 1895.

(Caption omitted.)

On this day comes the clerk of this court and makes known that a writ of error taking this case to the Supreme Court of the United States has been issued by the said clerk.

It is therefore hereby ordered by the court that execution of sentence, heretofore pronounced in this cause, be stayed pending the action of the Supreme Court.

10 *Bill of exceptions.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES }
vs.
DENNIS DAVIS. }

Be it remembered that upon the trial of the above stated cause, at the November term, 1894, in the circuit court of the United States for the

western district of Arkansas, the following proceedings were had: After the defendant was arraigned and had pleaded to the indictment, and the jury was empaneled, the Government introduced to sustain its case the testimony tending to prove the following facts:

That the defendant, Dennis Davis, who was not an Indian, shot and killed Sol Blackwell, who was not an Indian, near Eufaula, Creek Nation, I. T.; that the deceased when killed was in his field picking cotton, was unarmed, and was shot by defendant unawares; the bullet from defendant's gun striking deceased in the left side, ranging upwards, coming out of the right side of his body near his neck, and produced instant death. The testimony also tended to show that the defendant stealthily approached to within fifteen or twenty yards to where the deceased was at work, shot deceased while he was not looking at him, and immediately turned and ran away from the place of shooting. Shortly after killing the deceased, defendant met Dick Shaver, one of the Government witnesses, about a half of mile from the place of killing, when defendant said to him in response to an inquiry as to where he (defendant) was going, "I am going to jail, I guess," and when asked what for, said, "I killed Sol Blackwell."

11 Defendant then rode away, and when next seen had delivered himself up to the officers. The deceased's body was found in the cotton field at the place defendant said he had killed him, having in his hand loske of cotton and around him a cotton sack which had used in picking cotton.

The Government then introduced A. H. Brown, who, after being duly sworn, was asked if he ever heard Dennis Davis make any statement about this killing, to which he replied that "he did not." He was then asked if he was not before the commissioner when Davis made his statement, to which he replied that he was and heard the statement. He was then asked to state what defendant's statement was before the said U. S. commissioner, to which question the defendant's attorneys then and there excepted, and objected to the defendant's answering the question, because the testimony taken before and by the said commissioner was written down, and that the record and written evidence taken by said commissioner was the best evidence of the testimony and proceedings had before him. The objection was overruled, to which action of the court the defendant at the time excepted, and thereupon the witness answered, "that he was present at the trial by the U. S. commissioner; that the defendant was introduced as a witness in his own behalf, being first cautioned by the commissioner that he was not required to give evidence unless he desired to do so, and cautioned that he had better not say anything, because what he said could be used against him. After then being thus cautioned, the defendant was sworn as a witness and stated that he killed the deceased; that he had cleared up a little patch of cane and there was no understanding, and he (defendant) made up his part and Blackwell told him that if he did not make up his (Blackwell's) part he would kill him; that he (defend-

12 ant) staid in his house all day and night afraid to go out, and the next day he saw Blackwell picking cotton in the field and he slipped out and got a gun and shot him." To this testimony, in answer to the above question, the defendant at the time objected, because the testimony of the said Dennis Davis was written out before the said commissioner (it

being admitted that it was written down), and it was the best evidence of the proceedings had before him and of the evidence given. The objection was overruled, testimony admitted; to which action of the court the defendant at the time excepted.

The Government also proved by Ben Scales, witness for the Government, that while he was guarding defendant, he made the following statement to him in regard to killing the deceased: That he and the deceased had some words about sugar cane which Blackwell wanted defendant to strip, and which defendant refused to do unless Blackwell paid him for it; that Blackwell had a gun before him on his horse and rode up and said, "I want to see you, Davis," to which defendant replied, "If you want to see me, you come here; I am not supposed to go out to any man in arms;" that they had some talk about the cane, when Blackwell wheeled his gun around in the saddle and he (defendant) broke in a run around the corner of the house, and Blackwell said, "Damn you! I will get you any how." The next morning he saw Blackwell picking cotton in a field and he got a gun, crawled up to the fence to near where Blackwell was, and shot him; that he did not suppose Blackwell saw him. Defendant, to sustain the issues upon his part, introduced Dr. T. J. Wright, who testified as follows:

13 Dr. WRIGHT, having been duly sworn upon behalf of the defendant, was examined by Mr. Oglesby and testified as follows, to wit:

Question. Give us your name, please.

Answer. My name?

Q. Yes, sir.

A. T. J. Wright.

Q. What is your profession?

A. Medicine.

Q. How long have you been engaged in *pur*eticing n edicine, doctor?

A. Nearly thirty years.

Q. Are you a graduate of a medical college?

A. Yes, sir.

Q. Please state to the jury what medical college you have been a graduate of.

A. The St. Louis Medical College, St. Louis, Missouri.

Q. I will ask you to state to the jury whether or not, while attending the medical college, you devoted any time to diseases of the mind—the condition of the mind?

A. I devoted no time especially to that.

Q. On that general subject?

A. Yes, sir.

Q. Did you, in a general way, as a medical student, devote time to that?

A. Yes, sir; I devoted some time to it.

Q. Have you been constently engaged in the practice of medicine since then?

A. Yes, sir.

Q. For a pe*a*riod of thirty years?

A. Yes, sir; nearly that.

Q. D*o*ring that time have you studied mental diseases specially or in general practice?

A. In general practice; not in a general way.
Q. You have never been in charge of an asylum?
A. No, sir.
Q. You have had occasion to study mental diseases?
A. Yes, sir; occasionally.
Q. You have had occasion to treat people that were suffering?
14 A. Yes, sir.
Q. You know this defendant Davis?
A. Yes, sir; I suppose that is his name.
Q. You know this man here [indicating the defendant]?
A. Yes, sir.
Q. Do you occupy any official position with the prisoners at the Fed'ral jail?
A. Yes, sir; I am jail physician for the time.
Q. How long have you occupied that position?
A. I guess I was there in—I guess in the month of April I took charge over there.
Q. How long have you known this man in jail?
A. I don't remember.
Q. Just approximately.
A. Several months past.
Q. Have you had occasion to examine him and talk with him?
A. Yes, sir.
Q. Have you had occasion to familiarize yourself with his mental condition?
A. Yes, sir; I had a conversation with him.
Q. I will ask you to state to the jury what is his mental capacity; what you found to be his mental condition, whether sane or insane or weak-minded.
A. I consider his mental condition that of an imbecile—weakness, weak-minded.
Q. I will ask you to state to the jury, doctor, whether or not, in your judgment, his power to adhere to the right and avoid the wrong; whether he has the mental capacity if he fears—if he is in fear of anybody taking his life, if anybody would make threats against him, whether or not in your opinion, he has sufficient mental capacity in that condition to avoid the wrong and adhere to the right—that is, to avoid killing the man
15 because it is wrong.
A. My opinion is, gentlemen, that acting under a powerful impulse he would not have power to resist. In other words, he might in the abstract distinguish between right and wrong, but that in a concrete case he might not be able to cool'y and deliberately determine what *what* was the right and correct thing, and that acting under a powerful impulse he would not have the power of inhibition—the power to prevent himself.
Q. State what would be the probable and natural condition of a man's mind who feared another and thought he was about to kill him—whether that was a strong impulse.
A. Yes, sir; I would consider it so.
Q. You sonsider that would be the impulse? You stated to the jury he did not have the power to resist that impulse.
A. Yes, sir; fear is one of the strongest passions, and it might have a powerful influence with him.

Cross-examination by the DISTRICT ATTORNEY:

Q. How often have you talked with him?

A. I have had conversations with him in regard to his physical condition since he has been a prisoner in the jail a number of times; I don't know how often.

Q. What was the matter with him?

A. He claimed at one time that he was having the chills; I couldn't catch him with any fever or with the chill either. He wanted me to give him medicine, but I didn't think anything was the matter.

Q. He wanted you to give him some medicine?

A. Yes, sir.

Q. Did he complain to you that he was sick?

A. Yes, sir; he claimed that it had had chills, a'd when I would
16 ask him about the fever, and he said it would not exist more than an hour, and he failed to give any indications.

Q. It is a curious thing that a great many people think they have diseases?

A. Yes, sir.

Q. That is not an indication of mental weakness, of itself?

A. No, sir.

Q. How often have you talked with him with reference to determining the condition of his mind and mental powers?

A. Only once; two or days ago.

Q. How long did that conversation last?

A. I don't remember precisely; probably half an hour.

Q. What did you talk to him about?

A. I got him to give a history of this occurrence. I thought probably that I would get a better insight into his ability to distinguish between right and wrong and the control of himself, by leading him out on that matter.

Q. What history did he give you of it?

A. Well, the history that he gave me only amounted to this: That the man had been to his house and had threatened his life, and probably presented a gun at him, and that he had dodged behind the corner of the house and run around, and that the man had gone off saying that he would get him yet, or words to that effect; and that when he went out to strip cane that morning, seeing the man there, I believe he told me that he went back and got a gun or something of that kind and went out there. And his statement to me was that in crossing the fence that he saw the man over there a short distance, and that in crossing the fence a rail broke or turned and that he fell over, and that he jumped up very suddenly and very quickly and grabbed his gun and turned and fired on the man.

Q. Did he tell you in that conversation that he had crawled forty yards through the woods?

A. No, sir; he said nothing about that to me.

17 Q. He did not?

A. No, sir.

Q. And that he had gotten up. Did he tell you whether the man saw him when he shot?

A. I think he said that he thought that the man was looking at him as he was attempting to get over the fence.

Q. What kind of a fence was he getting over there?

A. I think he said a rail fence.

Q. If it should turn out, as a matter of fact, that it was not a rail fence, that he didn't get over any fence at all, but that he crawled th'ough the woods forty or fifty yards and got within 18 steps of this man, behind some broom corn, and just as the man was raising up from picking cotton, fired and killed him, when he was on one side of the fence and the man on the other, what would you say to this statement compared with what he said to you?

A. I should say that one or the other was not true.

Q. He would have lied to you if that statement is true?

A. I think so; yes, sir.

Q. What you base your opinion on is the view and presumption that the man thought when the rail broke with him, that under the agitation of the moment, believing that the man was going to attack him, he jumped up and fired the gun?

A. Yes, sir. He told me over there that he was under the impression that the man would kill him at the first time he had an opportunity. Having that impression and having fallen from the fence, the natural perturbation of the man in that case led him to believe it.

Q. Suppose he had not fallen over a fence at all; that having seen the man in cotton field, he went and got a gun and, crawled th'ough the woods to where the man could not see him, was there anything to cause perturbation at that time?

A. No, sir; nothing but the belief that that the man would kill him. You would have to eliminate part of ——

Q. Do you know—is your knowledge of human nature sufficient to know that it has frequently been that men who were proven sane, have done just as this man did when they were threatened by another man?

A. I suppose such instances have occurred.

Q. Is there anything in that fact that would induce you to believe that the man was insane or imbecilic?

A. No; not in that fact alone.

Q. Now, what is there outside of the story that this man told you that led you to believe that he was an imbecile, to that degree that he couldn't control himself?

A. Well, the man's general appearence and demeanor, and his conduct with me before I knew anything about the case or heard anything about it, had led me to believe that we was weak-minded.

Q. You mean a man whose mind is weak, you don't mean a man who is insane?

A. No, sir.

Q. A man who don't know the difference between right and wrong?

A. No, sir.

Q. But a man who is not able to control himself?

(No response.)

Q. What was there outside of this story that he told you that led you to believe that this man was unable to control himself when he was under a powerful influence?

A. The theory I have in the case, Judge, is simply this: That the man was lagoring under the belief—and from the way he talked to me I thought it was an honest conviction in his mind—that the man would kill him the first time he had an opportunity; he is unable to reason logically about the matter, and his conclusions in regard to the law about the matter led him to conclude that he was justified in killing the man the first time he met him; I took that as an evidence of weak-mindedness.

Q. Now, wasn't it apparent from his conversation with you that
19 his sense of law was wanting.

A. I said that; his inability to reason correctly and his great fear, all brought together.

Q. Now, suppose he did not believe at that time that he was in any immediate danger, and suppose that he had known that he was committing murder when he killed a man in that way?

A. That would materially change the face of the case.

Q. Now, you don't pretend to say that so far as your knowledge of the matter is concerned, that he does not know the difference between right and wrong?

A. No.

Q. Your only conclusion is that his mind is weak?

A. Yes, sir.

Q. To what extent, you are unable to say, are you not?

A. Well, he told me that he had been able to manage his affairs (I asked him about that) and hold his own with the world, but the points in my judgment lay in this: in his inability to reason correctly about the case.

Q. Isn't it a matter of fact—if a man would a thing of that kind, if any man would kill men like that—you would think he was weak-minded?

A. I think, as the honorable court said here the other day in charging the jury, that every crime is a blunder.

Q. Every crime is unnatural?

A. Yes, sir; I suppose so.

Q. Now, if anybody that you didn't know had acted as this defendant has done, wouldn't you say that he was weak-minded?

A. Not in the sense that I say this man is.

Q. What is there outside of that crime that indicates to you that he is weak-minded to that extent that he is not responsible for his acts?

A. A man sometimes commits a crime knowing itto be one for purposes of revenge or on account of some impulse besides fear.

Q. How do you know that this crime wasn't committed for revenge?

20 A. I only know what he told me.

Q. As a physician, now, an expert, do you think with the conversation and examination that you have made of this man, and the conversation, you are able to come to an accurate determination, as a matter of fact, to his condition?

A. Ye', sir; I think I have; I have a decided conviction that the man is mentally weak.

Q. But to that extent of weakness that he is not responsible for his actions? Do you think your examination in the half hour's talk you had with him, without knowing his previous history or conduct, without know-

ing the truth in regard to the killing, do you think you are competent to determine from that brief conversation that he was not responsible for his actions at that time?

A. I think a man of his mental ability is hardly responsible under any powerful impulse that might have moved him at that time.

Q. How do you know about his mental capacity; do you know anything of his history?

A. No, sir.

Q. Had you ever seen him before?

A. No, sir.

Q. Suppose you found out that he was lying to you about the crime?

A. That would materially alter it.

Q. It would show a shrewdness that you wouldn't expect to find there?

A. Yes, sir; it might do so; even mad people sometimes are very cunning.

Q. If he has planned the defence of this action after it is committed, don't that show a man of reasoning power that you don't find in a man when he is acting under an impulse that he is not responsible for his acts?

A. I couldn't tell about the theory of defence that this man has except in so far as his statement before the commissioner and his coming and giving himself up.

Q. You know nothing except that?

A. No, sir.

21 Q. Nothing except that?

A. No, sir; and I don't know that this defence was set up by him himself.

Q. He had another. Didn't he tell you that he didn't intend to *ki* kill the man when he went up there?

A. I don't remember; I think he said he didn't think of killing him—or something of that sort—until he saw him.

Q. Didn't he tell you that he didn't think of killing him until he fell?

A. No, sir.

Q. He told you he didn't think of killing him until he saw him?

A. Yes, sir.

Q. Was that after or before he got the gun?

A. He didn't tell me anything about the gun.

Q. I understood you to say he was picking cane down there?

A. I meant by that that he didn't tell me that he went back to the house and *gut* the gun, but he left me to infer that. He said nothing to me about going back and getting the gun—just getting the gun.

Q. He was ther' picking cane and saw this man up there, and went off forty or fifty yards or half a mile and came back and crawled through the woods and slipped up, as I have described, and shot the man when he was not looking at all. Did that sho' premeditation and a design that you would not expect to find in a man that was acting under a sudden impulse?

A. I have not said anywhere that I thought the impulse was sudden, except that there was a certain amount of perturbation in that fall, and from believing that the man would kill him the first time he saw him, or something that way.

Q. Wasn't it necessary, in order to come to anything like a correct estimate of a man's mental capacity, you have to tak' into consideration how he has conducted himself about matters generally?

A. Yes, sir.

22 Q. Can you take an isolated act and from that determine as to the strength or weekness of the man's mind?

A. Yes, sir; I could conceive of that. The general condition of the mind might be determined to some extent from the way he would act under any given circumstances or impulse.

Q. To some extent?

A. Yes, sir.

Q. But would that give you a correct measurement of the man's mind?

A. It would be an index to it, to say the least.

Q. What is it that prompts murder as a rule?

A. I don't know that I am able to give all the causes.

Q. Name the most prominent causes?

A. Revenge and jealousy and the object of gain, killing for the purpose of rob'ery, and fear.

Q. Well, now, suppose you had an abstract case put you, that a man had had a difficulty with a man and killed him; that it was conceded by the man who did the killing that he shot the man, that he saw the man at work in the field and went off the distance that I have spoken of and got a gun—suppose it was not this man, any man that you don't know—he went off and got a gun and slipped on this man, crawled up on him th'ough the bushes, and got within shooting distance of him and shot him and killed him and then turned and went off, running off through the bottom, and then afterwards surrendered himself to the authorities; what would you say about that man if it was another *amn* except this man?

A. Before I could say anything about any other man I would have to know something about him.

Q. You would wish to know his history?

A. Something of him; yes, sir.

23 Q. What would you have to know?

A. I would have to have some acquaintance with him.

Q. Not only upon acquaintance with the man after he was put in prison, when he knew he was going to be tried for his life, but his conduct prior to that time; would you take his conduct before or after he went in jail?

A. If I had an opportunity to take both I should do it.

Q. Which would you prefer?

A. Naturally, I should prefer his conduct before.

Q. Isn't it necessary—isn't it essential to correctly determine—would you not take into consideration his conduct beforehand, his general character, his man'er of life, and his characteristic conduct before the act occurred?

A. That would *pe* pro*b*er; yes, sir.

Q. Has your reading in medical jurisprudence ever taught you that men that have committed crime frequently from the moment the crime is committed begin to assume insanity and feign insanity?

A. Yes, sir; I have read of such things.

Q. That is of frequent occurrence?

(No response.)

Q. Do I understand you to say, now, that you are convinced from your half hour's conversation with this man, taking into view that he may

not have made a correct statement of the matter, that he is mentally weak to that condition that he ought not to be punished for the act?

A. What I mean is this, that I do not consider the man has distinction of evil, and I would not hold him equally as responsible as I would yourself or a number of other gentlemen I might mention in the town. I do not believe he is responsible to the extent that I would hold you responsible.

Q. But you don't go any further than that?

24 A. No, sir; I could not undertake to say precisely to what degree the man is irresponsible. I don't believe the man is capable of reasoning correctly if he is laboring under an impulse.

Q. Is any man, doctor, capable of reasoning correctly when laboring under a powerful impulse of fear or revenge?

A. I think not, in the sense in which I used it a while ago; men usually blunder.

Q. Any man acting under a powerful impulse of either fear or revenge is not capable of reasoning correctly or accurately?

A. I think some men are much more able to reason under the impulse than other men.

Q. Yes; I think so, too.

A. I think this man is less able than many other men I know.

The COURT. I didn't hear the last answer, please repeat it?

A. I say, while it may be true that no man acting under a powerful impulse is able to reason correctly and logically, yet I believe this man is less able to reason logically and correctly and less able to control himself than many other men that I might mention.

Re-direct examination by Mr. OGLESBY:

Q. Judge Read in his cross-examination asked you whether or not you had any occasion to examine him, to which you answered that you had noticed his general appearance and demeanor before examining him at all; that is correct?

A. Yes, sir.

Q. I understood you to say in answer to that, that from his general appearance and demeanor that he had impressed you before that he was not of sound mind?

A. Yes, sir; and from the questions I had asked him in regard to his physical condition.

25 Q. That was before you asked him anything in regard to this crime?

A. Yes, sir.

Q. He had impressed the fact upon your mind that he was not a sane man?

A. Yes, sir; he was weak-minded; he made that impression.

Q. Then you do not base your judgment alone upon the examination but upon your knowledge previous?

A. Yes, sir.

Q. Now, when you were observing him and treating and noticing him, did you have any idea that you were going to be a witness for him, so far as you knew?

A. No, sir.

Q. Was he assimulating or affecting, so far as you could discover?

A. No, sir.

Q. You could not discover that he was preparing a way to make a defence?

A. No, sir.

Q. When you came to doctor him did he seem to appreciate the fact that you had a motive in examining him?

A. No, sir.

Q. Did you give him to understand in any that it was for his benefit or advantage?

A. No, sir; I told him to sit down there and I would talk with him.

Q. When you stated that it is much better to know a man before the commission of the crime than afterwards, that depends upon whether or not he is acting naturally or not?

A. Yes, sir.

Q. If he is acting naturally after the crime, it is as good as before?

A. Yes, sir.

Q. State to the jury whether or not this man was acting naturally or affected when you were observing him?

A. My impression is that he was acting naturally.

Q. Without any affectation?

A. Yes, sir.

Q. Now, then, Judge Read asked you in regard to crawling along
26 the ground; I will ask you if your reading does not teach you that people that are known to be insane have taken the greatest care and preparation to commit a crime?

A. Yes, sir.

Q. I will ask you if the fact that a man prepares to commit a crime, if that necessarily indicates sanity?

A. I have heard of people who were distinctly insane to be capable of very cunning and very shrewd prearrangements.

Q. Now, you spoke of fear; I will ask you whether or not if fear produced by threats would have the same effect upon a man of his make-up [indicating the defendant] as upon a man of ordinary intellect?

A. I suppose so; yes, sir; probably a greater effect.

Q. Then you were asked whether or not he was capable of logically reasoning about the matter; now state, taking his mental condition as you understand it, in observing his face and expression, the shape of his head, his conduct, your talking with him, if he was in fear of his life—you don't know whether it is true or not—but if it is true then state in your opinion, now, is he capable of resisting the impulse to rid himself of that fear, or to destroy the man's life who put him in that fear? Is he capable of resisting that impulse and avoid the doing of a thing which he believes is necessary to save his life?

A. I believe if he labored under that impression and he thought that he had to commit the act and believed that his life was in danger, I argue that he was not capable of resisting the impulse to rid hi'self of that fear.

Recross-examination by the DISTRICT ATTORNEY:

Q. You judge that from the view that he had been threatened?
27 A. Yes, sir; I say I believe if he labored under that impression and under that impulse and theory he believed, as he assured me, that the man would kill him.

Q. And you believe that he labored under that impression, that the man was going to kill him, and that was the impulse that led him to kill the man?

A. Yes, sir.

Q. Now, if he had known that it was murder to do that, do you think he knows—I will ask you if he would have killed the man—if he didn't know or understand that it was wrong to kill a man who had not harmed in any way?

A. He said, "Yes," he knew that, and he would not kill any man but the man who had gone off away from him the last time saying he would get him yet, and he believed that the first time the man saw him, when he was out of his house where he couldn't dodge, that the man would kill him.

Q. Didn't he tell you that under those circumstances he had a right to kill him?

A. Yes, sir.

Q. That was the reason he killed him?

A. Yes, sir.

Q. He thought he had a right to do it?

A. Yes, sir; he thought he was justified in——

Q. Just tell us what he said. He thought he was justified in killing him under the circumstances?

A. Yes, sir.

Q. What is the difference between insanity and imbecility?

A. Imbecility is a congestive disease, I suppose, and insanity would be the result of mental injury or disease.

Q. I will ask you the question, are not the characteristics of insanity and imbecility entirely different?

A. Largely different; yes, sir.

28 Q. Do you ever find in an imbecile—I am not talking about simply weak-minded persons, but imbecile—this shrewd characteristic that you find in a person who is insane?

A. Not so often, I think.

Q. Isn't it a fact that an insane person is a person who has simply, for some reason, lost some faculty or power of the mind that has deranged the mind, but all the other faculties of the mind are as bright and active as ever?

A. That may be true; yes, sir.

Q. Now, these people, you say, exhibit great shrewdness in the preparation and after concealment of crime; they are insane people, ain't they?

A. Yes, sir.

Q. They are not imbeciles?

A. Yes, sir; that is right.

Q. They are insane and not imbeciles?

(No response.)

Mr. OGLESBY:

Q. You have no sort of interest in the world in this question?

A. No, sir.

Witness excused.

29 Other witnesses testified that they had been intimately acquainted with the defendant for a number of years, lived near him, and had been frequently with him, knew his mental condition, and that he was weak-minded, and regarded by his neighbors and people as being what they called half crazy. Other witnesses who had known the defendant from ten to twenty years, witnesses who had worked with him and had been thrown in constant contact with him, said he had always been called half crazy, weak-minded; and in the opinion of the witnesses defendant was not of sound mind.

This was all the testimony introduced in the case.

The court then charged the jury as follows:

30 *Charge of the court.*

Gentlemen, the defendant is before you charged with the crime of murder, for having on the 18th day of September, 1894—that is this last September—wilfully and with his malice aforethought, taken the life of Sol Blackwell, a negro and not an Indian, by shooting him with a gun. That is the nature of the charge in this case. The first thing that you are called upon to do is to find whether Sol Blackwell is dead, and you must see whether that fact is established beyond a reasonable doubt. Secondly, whether he died by violence of the kind named in the indictment—that is, that he was killed by being shot to death with a gun. You look to the evidence to see whether that fact is established beyond a reasonable doubt. Then you are to see whether the defendant did the act which resulted in his death. That is the third proposition that you are called upon to ascertain from the testimony in the case. Then you are to find what was the character of that killing—that is to say, you are called upon to characterize it and say whether it was a crime or not. The Government charges that it was murder. The defendant denies that it was murder, because he says that he did not—he says it by his counsel and by his defence here—that he did not have mind enough to commit the crime of murder. That there could not exist in the act, as done by him, the elements which show wilfulness and malice aforethought.

Now, these things are to be passed upon by you, and of course if you pass upon the different elements of the crime and find that it was done wilfully and with malice aforethought by the defendant, you will find that he has a responsible mind, and you will find that he is guilty of the crime of murder, because the existence of elements of that kind characterize the killing as "murder."

31 Now, it becomes necessary to tell you, and it will not take up a great deal of time, because there are cases of a certain class where you can take the circumstances and more readily and more easily find what is the character of the act done, than other cases. If this man is sane and the proof shows that he killed this man Sol Blackwell, by shooting him to death with a gun, there being nothing in the case that would excuse such an act of killing under the law, or that would reduce the grade of the crime, and that is a fact that the counsel upon the part of the defence concede in the case, if that is the man's condition, he is to be held responsible under the law. I say, where you find a case of that kind—where a man has been shot to death, where the facts, as claimed by the Government here,

show a laying in wait, show previous preparation, show the selection of a deadly weapon, and show concealment to get an opportunity to do the act, where that state of case exists, if there is mental condition of the kind that renders a man accountable—why, there is crime, and that crime is murder.

Still it is necessary that I should define to you these different elements of the crime under the law. It must be shown that the deed was done by the defendant as charged, that he intended to shoot Sol Blackwell with a gun and that that was done wilfully, and that means intentionally, because the word "wilfully" as used in this connection means intentionally and not accidentally. It means, in other words, that you are to take the act as done, and by means of that act you are to find out how it was done, because, although the law requires you to find the mental condition of the man, it does not expect an impossibility; it affords you a reasonable method of finding that mental condition. Now, that mental
32 condition cannot be found except by the circumstances. There is no power on the earth that can get into the human mind and determine what is going on there; you must determine that by the acts done.

You can stand in the presence of a great railroad engine, a thing constructed by man, and you can see its mechanism; you can see what is the object and mechanism of that engine. If it is headed south, or going south, you know it is going for the purpose of pulling what is attached to it, or for some purpose of that character. You can look at every wheel and every lever and every part of that engine, and from its appearance and the nature of its structure as you observe it you can see the object of these different parts of machinery. You can see its object by looking at it; but you can't do that with the human mind; yet you are required to find its condition.

Now, how are you to find it? You must judge of a man's purpose and of his thoughts by what he does. Now, suppose we see a man with our own eyes pointing a gun at another, and suppose, for example, that you would see a man discover another in the field at work picking cotton, and after he discovered him you would see him go off and get a Winchester or other gun and you find him coming back and see him wait to get an opportuniy to get a favorable shot at the man; from that act and from these numerous acts, what would you conclude, as reasonable men? Why, that the act was wilful; and not only that, but that the acts have a continued purpose; they were connected; they were systematic; they all tended towards the same result—that is, they tended towards the developed purpose of killing the man, who in this case was in his own field at work. That is what you would conclude if you would see all that.

33 Now, all that conduct is reproduced before you, and it is for you to say what are the facts, because I admonish you here that, although the court has a right to give its opinion of the evidence and tell you what each fact proves and what each fact is worth, still, the final power is with you to pass upon the weight of the evidence and of its proving power. You are the sole judges of its weight. The court may aid you by giving its opinion upon these propositions, but these questions connected with the evidence are finally to be determined by you. Now, I say, if that state of case is reproduced before you by the evidence, because it is impossible for you to see it, we cannot have it re-enacted with all the stage fixtures and all the accompanyments of a stage tragedy—that is, we cannot produce before you this bloody killing in the cotton field. It is

impossible. That would cost another human life. Therefore the only way you can see it is by the light of the facts and circumstances. And you are called upon to see it, and the only way you can see the condition of the mind of the man who executed the deadly purpose is by the light of these facts and circumstances. It is the only way you can find his mind. If these facts and circumstances are upon a parallel with the facts and circumstances of a man of sane mind when he kills, when he prepares to do it, when he selects a deadly weapon and lies in wait for his victim to get a favorable opportunity. All these facts and these circumstances show wilfullness, show an intent to kill upon his part, and these facts and circumstances are to be taken into consideration by you as intelligent jurymen when you come to pass upon the mental condition of the defendant—of the party accused of the crime.

34 Now, if you find that the defendant did these acts, and if they are proved to your satisfaction, beyond a reasonable doubt, then you take it for granted that the act of killing was a wilful act upon the part of the accused. That is to say, if you have a case before you that is shown by the evidence to that degree of certainty that it is proven beyond a reasonable doubt where the party presented the gun at the man fired upon and pulled the trigger, that shows wilfulness. The law tells us how we may find intent—I read from a celebrated case in this country, a case of the Commonwealth against York—

"A sane man, a voluntary agent, acting upon motives, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If, therefore, one voluntarily or wilfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion is that he intended so to destroy such person's life." It is a natural conclusion from the act done. If he points a gun at another in shooting distance and fires upon that other, and the party fired upon is killed, why, the law says he intended to kill him. The law says that it is an intentional act. Now, in another case where one of the present members of the Supreme Court of the United States, in talking upon the subject of malice or malice aforethought, said—it is Associate Justice Field when sitting upon the circuit court bench in California:

"Now malice is implied in every case of intentional homicide; that is to say, when once it is established that a person was intentionally killed, the law implies that malice existed in the party who caused the death. If there are any circumstances of excuse or palliation which will

35 rebut the implication of malice, it is incumbent upon him to show them. The burden of proof rests upon him, for the law presumes that every person intends to produce the results which are the usual consequences of his acts. A man cannot strike another violently with a bar of iron without inflicting bodily pain; if therefore, he does thus strike another, the law presumes that he intended thus to inflict pain." Now another proposition: "The usual effect of a leaden ball fired from a loaded pistol of the common size, at a distance of a few feet only, striking the head or back of a person, is to kill such person; the law, therefore, presumes that everyone who thus fires a loaded pistol within a few feet of the object, intends to kill; it therefore implies malice in him."

Now, I have told you what is meant by "intent" and "wilful," and when you have that condition shown by the testimony, which shows that

the defendant presented the gun at the party killed, while in the cotton field at work, and fired it at him, you have the doing of an intentional act and consequently the doing of a wilful act. Now, the connection between an act of that character and the result called "death" is so usual, it is so probable, it is so natural and it so often occurs, that the law says that when you find that he intentionally did the act, he intentionally produces that death, and, therefore, wilfully produces it. It is the first element of the crime of murder. It is not the distinguishing characteristic, however, because wilfulness might exist in a case of manslaughter. But, in a case where there no mitigating facts, where there are no reasons to justify the killing under the law, when you have the doing of a wrongful act wilfully, when you have it done intentionally,
36 you have also existing in connection with it the other great characteristic of the crime known as "malice aforethought." Why? Because the definition of the law is of a character to show that malice aforethought exists when an act that results in death is done wilfully and without just cause or excuse, or in the absence of legal provocation or mitigating facts.

Malice aforethought means the doing of a wrongful act. When we come to acts of this kind which result in death, without just cause or excuse, or in the absence of anything which would mitigate the crime—that is to say, that the party had no ground to kill in self-defense or when the crime could not be reduced in grade because of the conduct at the time of the killing of the party who was killed—in the absence of these two conditions, when the evidence shows, first, the seeking of an opportunity; secondly, the preparation of deadly means; thirdly, lying in wait in order that he might be where the deadly missile could be sent through the body of the victim—I say, where you find this, and there is the mental condition known as "sanity," you have malice aforethought, because you have the doing of a wrongful act without just cause or excuse, or in the absence of mitigating facts, which produce death. Therefore the law lays it down. Associate Justice Field lays it down in the case I have read to you, that where you have a wilful killing and an intentional killing, where you have a killing which shows the means that were used to produce that result, which shows the systematic selection and preparation of a deadly agency in the shape of a gun, the selection of a location and hiding in ambush; with these attendant circumstances of the act, you have that which shows deliberation, you have that which shows premeditation, you have that which shows thought of beforehand, and therefore, you have that which is malice aforethought, which shows the existence of
37 that terrible thing which characterizes a killing and makes it murder; known as the taking of human life without just cause or excuse, or in the absence of mitigating facts.

Again, the law says, that if a man for some fancied or real wrong which does not justify the act under the law, takes a human life in such a way as to show a heart void of social duty and a mind fatally bent upon mischief, that that has attending it "malice aforethought." Because, each of us while occupying a position in society, occupy a relative position; we do not stand alone. Any and every man has the right to his life as the most precious and dearest right that belongs to him, until he forfeits that right under the law for his crime. And when another man, wickedly, wantonly,

without just cause or excuse, or in the absence of mitigating circumstances, robs him of that life, why he is forgetting the high social duty that rests upon him not to destroy but to protect it. To protect innocent human life, to protect unoffending life, to protect life that is entitled under the law to be protected—he forgets that high social duty. And when he does an act characterized by previous preparation, when he does an act characterized by lying in wait, when he does an act characterized by seeking ambush, where he can safely and securely do the deadly deed; I say when it is an act of that character, why the're facts attending it which show the existence of a mind fatally bent upon mischief. Therefore, when you have an act done in that way, you have malice aforethought. That is, when the act is established in such a way as to show the heart void of social duty and the mind fatally bent upon mischief, that makes malice aforethought.

Now, again, I read you an extract which may be pertinent. I read from the case of the Commonwealth against York, a celebrated
38 American case, which says: "Malice aforethought, in its legal meaning, means a wrongful act done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse." Just what I have told you. "If I maim cattle without knowing whose they are, if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act done intentionally. If I am arraigned of a felony and wilfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse. This is sometimes called malice in law in contradistinction to malice in fact, because the law draws the inference from the fact. The court charged the jury in the case of Wills against Noyes, 12th Pickering: 'Legal malice might differ from malice in the acceptation of the term; that to do a wrongful act, knowing it to be such, constituted legal malice.' That was confirmed by the whole court, and so that whatever is done with a wilful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, constitutes legal malice." In a more recent case of the Commonwealth against Snelling, the court, after noticing the legal and popular meaning of the term "malice," says:

"In a legal sense any act done wilfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, malicious." These instances, taken from cases having no analogy to the crime of homicide, are adduced to show that the presumption of malice from a wrongful act, an injurious act, wilfully done, when applied to homicide, is not technical or artificial or invented for the particular occasion,
39 but is the result of a mode of legal reasoning which is of general application. The same doctrine is laid down as the undoubted law of England in a recent work of good authority, frequently republished and in extensive use in this country (2 Stark Ev., 963), in which the writer states the general doctrine I have been stating, that "malicious" imports nothing more than the wicked and perverse disposition with which the party commits the act; and he illustrates the general proposition by a reference to this presumption of malice in the case of homicide. His words are:

"The application of the term 'malicious' is strongly illustrated in the case of homicide where the malus animus, which brings the offence within

the denomination of wilful murder, is frequently to be collected by the court as a matter of law from the circumstances of the case, and is not an inference of fact to be drawn by a jury, as it must necessarily be whenever the malice consists in the specific intention actually existing in the mind of the agent at the time of the act."

Now, then, I say to you, if you have that as attending this killing, in the shape of previous preparation, in the selection of deadly means, in the selection of an opportunity, in the hiding of the party who executes the purpose—if you find the existence of these things as attending this killing, they are circumstances to show—they are circumstances that you are to take into consideration—to show premeditation, to show that he thought of the act beforehand, to show that he considered the purpose beforehand, to show that he contemplated the purpose. Now, when a man premeditates a wicked design that produces death, and executes that design, if he is a sane
40 being, if he is what the law calls a sane man, not that he may be partially insane, not that he may be eccentric, and not that he may be unable to control his will power if he is in a passion or rage because of some real or imaginary grievance he may have received—I say, if you find him in that condition and you find these other things attending the act, you would necessarily find the existence of the attributes of the crime of murder known as "wilfullness" and "malice aforethought." Now, it is claimed by the defendant here that he was incompetent to commit a crime at the time of the commission of this act. That raises an issue in the case, and it becomes necessary that I should give you the law bearing upon that issue, and I ask your most earnest attention to every word that I say here upon this subject. You are not to say what the law is. We follow what the law says on the subject, and when we do that we are apt to arrive at a safe conclusion; we are apt to find a verdict that is in harmony with the truth, and as it should be. You will bear in mind in this connection that this man comes into this tribunal with the presumption which the law universally recognizes, and that is that he is sane. Every man the law presumes to be sane. If it didn't do it we would be in a most deplorable condition. If, when you tried to render a verdict here, the presumption was you were insane, it would be ruinous; you could perform no act, you could render no verdict, because when you would give in your verdict you would have to accompany it with the proof of your sanity. It would dissolve society, it would destroy the business of the country, it would break down the very bulwarks of justice, it would unhinge everything. Therefore the law in its wisdom, upon the ground of public policy, holds every man as sane.

41 It presumes every man is sane, and the burden of showing it is not true is upon the party who asserts it. The responsibility of overturning that presumption, that the law recognizes as one that is universal, is with the party who sets it up as a defense. The Government is not required to show it. The law presumes that we are all sane; therefore the Government does not have to furnish any evidence to show that this defendant is sane. It comes in here with the fact established in legal contemplation until it is overthrown. The Government takes and keeps that attitude until the evidence brought in the case overthrows this presumption of sanity. Now, let us see what the nature of this defence is. The defendant interposes the plea of insanity, and he says by this plea that he

did the killing, but the act is not one for which he can be held responsible. In other words, that the act was and is excusable in the law, because he was insane at the time of its commission. Now, I say to you in this connection, and it is a fact admitted in argument by the counsel, that under the evidence there is nothing that justifies the act of the killing; nor was it such an act that the law upholds it or mitigates it, or reduces it to a grade lower than murder. If it was committed by the defendant while he was actually insane, it is excusable.

Now, we want to know above all other things what is meant by being "actually insane." That is just what we want to know. We do not want to make any mistake against him. We do not want to make a mistake against the Government or against its people. Because if it is found that he was insane, and we would convict him, that would be a mistake; and it would be a mistake to the people of America if a man can cover up an act that is a crime under a plea of insanity that is not true.

42 First, then, we must know exactly and precisely what is meant in law by his being insane. Now, I will undertake or endeavor to tell you, and I bespeak your most earnest attention especially upon this proposition of "insanity." The term "insanity," as used in this defense, means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing; or where, though conscious of the nature of the act and able to distinguish between right and wrong, and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been, otherwise than voluntarily, so completely destroyed that his actions are not subject to it, but are beyond his control. Such insanity, if proved to your reasonable satisfaction to have existed at the time of the commission of the act—that is the test—at the time of its commission, is in the law an excuse for it, however brutal or atrocious it may have been. For a person to be excused from criminal responsibility, it is not necessary that he be a raving maniac, but ordinarily it requires something more than mere eccentricity of a natural character Such insanity does not excuse. A person may be afflicted with partial insanity and yet be wholly responsible to the criminal laws of his country for his criminal act. The law does not excuse in such cases unless the derangement is so great that it actually renders the person incapable of distinguishing between right and wrong. Now, it may be well in this connection to inquire what is meant by knowing the right from the wrong, with reference to the particular act charged against the defendant. The law assumes the existence of the power of consciousness for persons of ordinary intelligence or capacity to distinguish between right and wrong in reference to particular

43 actions. If the defendant was incapable of knowing the right from the wrong with reference to the particular act charged against him, or unconscious at the time of the nature of the act, or if he was deprived of his will power to such an extent as to render him at the time unable to control his passions, he would be excusable. And when I say "deprived of his will power," I mean not that he has voluntarily thrown it off and abandoned himself to his passions or his whims. It is not a state of case where a man has been deprived of his will to some extent. Whenever a man, from passion, from deliberate malice, takes a human

life, he throws off that power, that part of him known as his governing power or will power; he destroys its domination, he dethrones it purposely, and his passions, his malice, his dark and infamous malignity, assumes its place and rules the man. That is not a case where he was deprived of his will power so he can say he is insane. There is no such thing as crime if that is the law, because no man who takes human life in such a way as to make it murder takes it where this will power given by the All Wise Being for his self government is not overturned, is not dethroned, is not for the time being paralyzed; but that is not insanity. He purposely sanctions this ruling passion of his, he purposely destroys his will power that he may enter upon his bloody mission. Then he becomes a murderer, then he commits the foul crime of murder.

I mean, then, not that he has voluntarily thrown off this will power, because the man killed may have threatened his life, and he thinks for that reason he could take his life. If threats had been made, if that part of his story is true, and he killed him by reason of these threats—by reason of threats often made—and if the evidence shows that at the time of the killing, when he came back, that the man he killed was engaged
44 in picking cotton, had the cotton sack swung to him, and even the bunch of cotton in his hand, when his soul, by the hand of the defendant was ushered into eternity—I say if you find that state of case, you find existing facts which you have a right to take into consideration as reasons why he threw off his will power. That would be a state of case over which he had control; where he was called upon by the law to control himself.

It is a proposition, true, perhaps, that in a majority of murder cases, where men commit crime deliberately, where they previously prepare for it, where they seek an opportunity and lie in wait, where they conceal themselves behind an ambuscade that they may not be discovered until they have accomplished their purpose; I say, it is perhaps entirely true, that that would present a state of case where the evidence would show that he was dominated by an uncontrollable passion to such an extent that he could no longer control it. And if the proposition is true, whether it be asserted by science or not that insanity exists when a man loses his will power under such circumstances, then away with the law; it is a mockery; it is a sham and a delusion; it becomes a mere trick to defeat justice; a mere scheme to cover up crime, a mere effort to conceal the criminal act in order that the criminal may again ply his vocation. That is not the law. The law does not recognize it as insanity. It is not good sense that a man who has perpetrated crime with such recklessness and under such circumstances, with his mind uncontrolled and dominated by something other than his will power, that he is not to be held responsible.

I mean, not that he has voluntarily thrown it off and abandoned himself to the domination of his passions or his whims, but, that by disease or some other cause, over which he had no control, it has been wrested from him.

45 Now, as I have already told you, the law presumes every person who has reached the years of discretion to be of sane mind, and this presumption continues until the contrary is shown. So that when, as in this case, insanity is interposed as a defence, the fact of the existence of

such insanity at the time of the commission of the offense charged, must be established by the evidence to the reasonable satisfaction of a jury, and the burden of proof of the insanity rests with the defendant.

Although you may believe and find from the evidence that the defendant did commit the act charged against him, yet, if you further find that at the time he did so he was in such an insane condition of mind that he did not and could not understand and comprehend the nature of the act; or that thus knowing and understanding it, he was so far deprived of his will, not by his own passion conceived for the purpose of spurring him on to commit the violence, not by his own passion of mind engendered by some real or fancied grievance; but that he was so far deprived of his will by disease or other cause over which he had no control, as to render him unable to control his actions, then such killing was not a malicious killing, and you will acquit him of the crime charged against him.

Now, you are to bear in mind that you are not to find a man insane because of the wickedness or brutality of the act. If you find every man insane for that reason, the very worst crimes would go unpunished, and you would only be called upon to find the man sane who committed murder in a decent and gentlemanly manner. If he would get his gun and find his enemy in the field and go and lie in wait for him, why, if these are attributes of insanity, the very worst crimes would go unpun-
46 ished. For a man in a fight might be technically guilty of murder in a contest to some extent provoked by his adversary, yet, if the circumstances were such that the law would not excuse or mitigate it, why, he would be the one upon whose head the blow would fall; and the man of deliberate purpose, the man of preconceived design, the man of wicked motive, the man who, because he had been threatened, would deliberately prepare himself with a deadly agency, seek an opportunity to kill his enemy, he would be insane because the crime is atrocious and brutal.

That is not the law; if it were, I say again, the very worst crimes would go unpunished.

Now, we are to see whether the actions of the man are upon a parallel with the man of sane mind; not that you are to see that the actions of the man who kills deliberately and intentionally are on a parallel with the actions of the man of honest heart and of pure mind, because when a man conceives murder he departs from the world of honesty and of purity and uprightness and integrity; he lives in another planet; he lives in a murderer's home; he lives in the home of the man of malice, of malignant design; he lives in the home of the man of wicked purpose. His actions from the conception of that purpose are entirely different from the actions of the man whose mind is incapable of conceiving a murderous design. The human heart was not created as the habitation of a design to murder—to destroy human life. And when it becomes such, when that design becomes an inhabitant of the heart, it perverts the mind and destroys the judgment and overturns the reasoning power. So that the actions of the murderer, so that the conduct of the man who wilfully and with malice aforethought slays his fellow man is entirely different from the conduct of the man who is not a man of crime. Therefore in looking for the exist-
ence of insanity you are first to take the presumption that the law
47 recognizes that the defendant comes into the court as a sane man, and the circumstances must be such as to show his insanity to your

reasonable satisfaction before that presumption of fact, recognized by the law, can be removed. If it is not removed by facts and circumstances it prevails to the end of the case. He is still sane to the end of the case, and the fact that the killing may have been an atrocious killing, that it may have been a comparatively motiveless killing, are not facts calculated to show insanity.

Now, it may be possible that you will be instructed somewhat by me, giving you the proposition of law bearing upon the subject of malice. I tell you that in no case is it necessary to find a motive for a crime, and especially is it not necessary to find adequate motive. Where could you find adequate motive for a murder? Why, you are honest men, you are pure-minded men, you are men who love your fellows, who recognize the golden rule, men with minds of that kind and hearts of that nature, in looking for the motive of a deliberate and wicked murder would most likely overlook it, because of its insignificant nature from your judgment. For, by the judgment of such men, nothing in life is adequate as a motive for such a killing, a killing that would be a wicked and deliberate murder. No motive is adequate. You can find none. The act in the judgment of honest men may be perfectly motiveless. The motive may be so inadequate or inconsiderable that they will overlook it. Now, if any man would reason deliberately and fairly before committing a crime—before committing a murder—he would not do it. It is a fact that every man who thus takes human life, has, to some extent, a perverted mind; he has a heart so perveerted that he can not conceive his own interest even; he forgets his duty to his fellow men; but the interest of society and
48 the protection of the lives of its members will not permit us to regard every man of that kind as an insane man and who is to go scott free or go unpunished.

Now, I wish to say a word upon the subject of motiveless acts. It may be of some benefit to you in this connection:

"It is sometimes argued——"

I read what Mr. Wharton says upon this subject of motive and its adequacy—

"It is sometimes argued is it likely that one man should kill another for so small an article? Are we not to infer when there is a homicide which is followed by the stealing of a mere trifle that the homicide was the result of sudden passion rather than lucri causa (desire for gain)?"

"Or for a mere prejudice or spite is it likely that one man would kill another and thus expose himself to the gallows? No doubt when a tender mother kills a child, or a friend kills a friend, and nothing more than the fact of the killing is proved, we may be led to infer misadventure, or insanity, from the motivelessness of the act. But we have no right to make such inference, because the motive is disproportionate. We are all of us apt to act on very inadequate motives, and the history of crime shows that murders are generally committed from motives comparatively trivial. A man, unaccustomed to control his passions and unregulated by religious or moral sense, exaggerates an affront or nourishes a suspicion, until he determines that only the blood of the supposed offender can relieve the pang. So also for the smallest plunder murders have been deliberately executed."

Now, it is often said that a trivial motive is not a motive that could explain a lying in wait and previous preparation to do an act so cruel
49 and with chances of exposure so great. But the reply to this is obvious. Crime is rarely logical. The criminal does not reason as he should; he is incapable of it. He draws false conclusions, and his logic is faulty all the way through. If it was not he would not commit crime, and the fact that his logic is faulty, that his reasoning powers are not of that character that enables him to take a correct view of the situation, does not establish his insanity. Crime is rarely logical. Under a Government where the laws are executed with ordinary certainty, all crime is a blunder as well as a wrong. If we should hold that no crime is to be punished except such as is rational, then there would be no crime to be punished, for no crime can be found that is rational. The motive is never correlative to the crime, never accurately proportioned to it. Nor does it apply solely to the very poor. Very rich men have been known to defraud others even of mere trifles, to forge wills, to kidnap and kill, so that an inheritance might be theirs. When a powerful passion seeks gratification, it is no extenuation that the act is illogical; for when passion is once allowed to operate, reason loosens its restraints.

It does not show insanity, either, because a man acting in a state of passion brought into existence by some real or imaginary grievance upon his part, and he kills because of that passion, and the killing is done in such a way as to show the systematic preparation for the act, systematic seeking of an opportunity, an opportunity in the execution of his purpose to take advantage of his victim. Why, the law says that if a man previously prepares himself with a deadly agency, and conceals himself and lies in wait to kill his enemy, and that man is of sound mind, that it is not only murder, but it is assassination. The killing of a man in
50 an unsuspecting hour, killing him when he is unable to aid himself, killing him when he is not prepared with a weapon of defense.

Why, away in the East at one time, there was band of men who were organized together for the purpose of assassinating. Prominent men in Europe, and those who wanted to have men taken off would go there, and through their chief, who had a palace away out in Asia somewhere, would hire him for so much money to send some deadly agent to the palace of a king or some other place, and some night a dagger would be seen sticking through his breast, or he would be mysteriously killed. The word assassin originated from the fact that these people, these assassins in the far East, were called "Hashishin," and the word assassin came from it. That is the origination of it.

Now, there is such a condition recognized by the law as that a man may act under an insane delusion, and be regarded as insane. It is necessary that the doctrine of the law upon this subject should be given with great care, that we may know what is meant by it. You would naturally inquire what is meant by "insane delusion." If a man thinks he can kill—thinks he has a right to kill—and shoots a man down, is that an insane delusion? Not at all. That is not the proposition. If a man has a conception that somebody at the time of the killing that the man whom he kills is then and there at that time attempting his life when such is not the fact, there is no foundation for it, and he kills under that delusion, that is evidence of mental derangement of such degree that it may be taken as

insanity. But if the man had made threats against him, and he was acting upon the idea that he could kill because of the threats, he has made a mistake as to the law and it is no insane delusion. That is not an
51 insane delusion; that is a mis-conception of legal right and it is not evidence of insanity. He may not have been correct in his judgment of his rights, but the law presumes that he knows the law, and he does, because every man does who is under the legal presumption of sanity until that presumption is overthrown. That is not what is meant by an insane delusion. Now, listen to the answer made by the House of Lords in answer to a question addressed to them a good many years ago:

"Nearly forty years ago one MacNighten was tried in England for killing a Mr. Drummond, private secretary of Sir Robert Peel, mistaking him for the premier himself. He was acquitted on the ground of insanity, and his acquittal caused so much excitement that the House of Lords addressed certain questions to the judges of the superior courts of England in regard to the law of insanity in certain cases, and their answers have since been regarded as settling the law on this subject in England, and with some qualification have been approved in the courts of this country. One of the questions was: 'If a person, under an insane delusion only, and is not in other respects insane, he must be considered in the same situation, as to responsibility, as if the facts with regard to which delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge, for such supposed injury, he would be liable to punishment."

For example, if under the influence of his delusion he supposes another man to be in the act of attempting his life and he kills the man
52 as he kills in self-defence, he would act under an insane delusion. Where there is no foundation for that, where he kills him because of threats made, then there is not that state of case that would lead you to believe that at the time of the killing he was under the delusion that the man killed—in this case, the man is Sol Blackwell—was in the act of taking his life. And that must exist. And he must kill upon that ground. To establish that, then, it must be shown that the cause of the killing was a conclusion in his mind that at the time he slew him—that is in this case when he was picking cotton in the field—that Sol Blackwell was in the act of killing him, when such was not the fact, that would be an insane delusion. But, if he killed Sol Blackwell while he was at work, because of these threats that had been made, that becomes evidence of deliberation; that becomes evidence of design; that shows previous preparation; it shows lying in wait; shows the doing of the act systematically and with a continued purpose; and it does not show that the defendant acted under the insane delusion that Blackwell was at the time trying to take his life.

Again, reading from the case of the Commonwealth against Rogers, when Chief Justice Shaw recognizes the doctrine:

"Monomania may be offered as an excuse for a criminal act when the delusion is such that the person under its influence has a real and firm belief of some fact not true in itself, but which, if it were true, would excuse the act——"

You see the proposition just as I have given it.

"Where the person under its influence has a real and firm belief."

For example: That at the time he shot Blackwell, Blackwell was in the act of killing him, that it was not true in itself, "but which, if it
53 were true, would excuse the act; as when the belief is that the party killed"—that is Blackwell in this case—"the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defence."

Now, if he killed because of threats, then there would not be anything to show that Blackwell, at the time of the killing, "had an immediate design upon his life," or that he was in the act of doing anything of that kind. It would not show, in other words, that the killing was caused by the conception in the mind of the defendant that Blackwell was then and there in the act of taking his life, when such was not the fact. "A common instance is, where he fully believes that the act he has to do is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supercedes all human laws and the laws of nature."

"But the insane delusion"—(says the court in charging the jury in the celebrated case of the United States against Guiteau, for the killing of President Garfield)—"but the insane delusion, according to all the testimony, seems to be an unreasonable and incorrigible belief in facts which are either impossible absolutely, or at least impossible under the circumstances of the individual. A man with no reason for it believes that another is attempting his life, or that he himself is the owner of untold wealth, or that he has invented something that will revolutionize the world, or that he is God or Christ, or that he is dead, or that he is immortal, or that he has a glass arm, or that he is pursued by enemies, or that he is inspired by God to do something." If he acts under these insane delu-
sions, and there is nothing upon which they can be based, and he
54 acts in good faith, operating under a delusion of that kind, that excuses him; but it must be of that character. In this case it must have been a state of case where he acted under the belief at the time he killed Blackwell that Blackwell was in the act of killing him; in the act of perpetrating upon him an act of deadly violence, or that he might do him some great bodily harm, and that he could not reasonably escape from such a condition, it would be an insane delusion that would excuse. Now, we start into this issue of sanity or insanity with the presumption that the defendant is sane, and the burden of showing that he is not is upon him.

Evidence has been offered to you for the purpose of showing that condition of mind that would excuse him for the killing of Sol Blackwell. That evidence is of two kinds. It is the evidence of one expert, who tells you he saw the defendant on one occasion and examined him particularly with reference to this matter, and saw him perhaps two or three times since he came in the jail. Other witnesses are brought before you who are called under the law "lay witnesses"—witnesses who are not skilled witnesses, not scientists, not men who have made it a business, perhaps, to pass upon the question of sanity or insanity.

Now, the law says, when you come to testimony from an expert you are not to take his opinion as conclusive. You are to get at the founda-

tion of that opinion, and see what reasons he gives for it. You are to see what opportunity he had for making his investigations; what was the length of his acquaintance with the party, and you are to bear in mind that while you may take into consideration his actions since the crime, yet you are to bear in mind that he may be dissimulating for a purpose; he may be playing a game for the purpose of deception; and you are to take that into account in passing upon it.

55 You are to consider, then, in passing upon the question of the weight to be attached to the testimony of an expert witness, what opportunity he had for founding his opinion that he gives to you as an opinion, if it is for the purpose of establishing insanity. You are to see what the nature of that opinion is—that is, how far it goes; whether it goes to the extent of producing that degree of insanity that would, under the law, prove that it exists; that under the law that I have given you it excuses the defendant for the killing of Sol Blackwell, providing it exists as a fact. But first you are to see whether it exists.

Now, in passing upon the testimony of experts, it is proper that I should give you what the law says on testimony of that kind.

"When expert testimony was first introduced it was regarded with great respect. An expert, when called as a witness, was viewed as the representative of the science of which he was a professor, giving impartially its conclusions.

"Two conditions have combined to produce a material change in this relation. In the first place, it has been discovered that no expert, no matter how learned or how incorrupt he may be, speaks for his science as a whole. Few specialties are so small as not to be torn by factions, and often the smaller the specialty the bitterer and more inflaming and destroying are the animosities by which these factions are possessed. Peculiarly is this the case in matters psycholo*l*ogical in which there is no hypothesis so monstrous that an expert cannot be found to swear to it on the stand and to defend it with vehemence off the stand.

"It is an opinion at best; it may be founded upon facts, and it may be a mere conclusion reduced from circumstances.

"In the second place, the retaining of experts by a fee proportioned
56 to the importance of their testimony is now, in cases in *in* which they are required, as customary as is the retaining of lawyers. No court would take as authority the sworn statement of the law given by counsel retained on a particular side. For the reason that the most high-minded men are so swayed by an employment of this kind as to loose the power of impartial judgment; and so intense is that conviction that there is no civilized community in which a judge who receives a present from a suitor is not buried in disgrace. Hence it is that apart from the partisan temper more or less common to experts, their utterances, now that they have as a class become the retained agents of parties, have lost all judicial authority and are entitled only to the weight which a sound and cautious criticism would award to such utterances. In adjusting this criticism a large allowance must be made for the bias necessarily belonging to men retained to advocate a cause, who speak not as to fact but as to opinion, and who are selected on all moot questions either from their prior advocacy or from their readiness to adopt the opinion to be proved.

"In this sense we may adopt the strong language of Doctor Campbell, that 'skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence.'" Wharton's Criminal Evidence, Sec. 420.

That is the way the law looks upon testimony of that kind.

It is for you to take the standard that it has under the law, and by that standard weigh it. You are to see what reasons sustain it. If the opinion of an expert is given, and it is well sustained by facts and circumstances, you have a right to give it such weight as in your judgment, as men of observation in life, it is entitled to. But you are the judges, as to whether these reasons offered by the expert are of sufficient value to give it weight.

57 Now, again, the testimony of the other witnesses are merely matters of opinion. The witnesses who have known the man, the common country people, are all competent to give an opinion upon matters of this kind from their association with the party, from their observation of this conduct through a long period. They may be much more competent than men of science and skill who have seen him but for a brief period. You are to see whether these opinions are such—whether they describe a condition that is recognized by the law as a condition of insanity that would excuse, not if it is partial insanity, not if it is mere eccentricity, not that it is mere peculiarity, but if it is a condition such as that he is unable to distinguish right from wrong with reference to the act, or if he is governed by this insane impulse that he cannot control, growing out of a state of facts that he believes to be real, if they were not real, as would give him the right to take life. Now, then, I say you have a right to take the opinions of these men who come in here an' who claim to know the defendant and undertake to give you opinions, see what their reasons are, and if they are not sufficient you have a right disregard their opinions. If they are well sustained by proper reasons so as to show this condition, then you have a right to take those opinions. But you are to take into consideration every fact and circumstance to see whether or not these opinions amount to anything; see whether or not they are properly sustained; see whether they are sustained by proper reasons. You are to take all these facts and circumstances into account.

It is necessary in this connection to tell you what the law is in regard to threats. The supposition that he can go and kill his enemy, as I have already told you, because he has threatened him is not an insane delusion that would give him the right to kill.

58 There must be a condition to be an insane delusion, a condition that would give him the right to kill if it were true. I have already given you the state of case that at the time the conception was that this man that he slew was in the act of taking his life and under that belief he slew him, then there is an insane delusion. If he killed because of threats he killed in such a way as to show premeditation, as to show thought of beforehand, as to show a preconceived purpose to slay. Now, reading from the case of Wiggins against the people, decided by the Supreme Court of the United States, Mr. Justice Clifford, the justice who delivered the dissenting opinion, says:

"Courts of justice everywhere agree that neither the bad character of the deceased, nor any threats that he may have made, forfeits his right to

7th. The defendant excepts to that portion of the charge where the court says the opinions of scientific men are not good common sense, etc.

8th. The defendant excepts to that portion of the court's charge with reference to motiveless acts where he reads from Wharton's Criminal Law, Homicide, etc.

9th. The defendant excepts to that portion of the charge of the court where reference is made to the origin and historical allusions of the word assassin.

63 10th. The defendant excepts to that portion of the charge of the court where the term insane delusion is defined, and where reference is made to the case presented to the House of Lords, etc.

11th. The defendant excepts to that portion of the charge of the court where reference is made to the killing of President Garfield by Guiteau. That is not a case similar to the one on trial now; that the facts in the case are not similar, etc.

12th. The defendant excepts to remarks of the court where reference is made to the expert testimony of Dr. Wright; also the testimony of the "lay" witnesses who were introduced to prove the unsoundness of defendant's mind.

13th. The defendant excepts to that part of the court's charge where reference is made to expert testimony. Defendant wants to except to the whole of that portion of the charge on the subject of expert testimony. Also excepts to the wording of the declaration of Lord Campbell on the subject of experts or expert testimony.

14th. The defendant excepts to that part of the court's charge where reference is made to threats; also that an opinion from the judge who delivered a dissenting opinion is not law; that it was error to read from the judge who delivered the dissenting opinion in Wiggins vs. The United States.

15th. The defendant through his attorneys has asked the court to give certain instructions with reference to the law governing this case and those instructions were not given by the court, to which defendant at the time excepts.

64 Exceptions taken by Mr. Meyer, one of the attorneys for the defendant:

1st. The tried to show that the act was done wilful.

2nd. We can not reproduce this bloody killing in the cotton fields, etc.

3rd. These acts may be taken into consideration when you come to pass upon the insanity of the defendant, etc.

4th. When the attendant facts show the preparation, the hiding in ambush, etc., you have that which shows the existence or malice aforethought, you have that which makes it murder.

5th. When he commits an act characterized by ambush, etc., these are facts which show the existence of a mind fatally bent on mischief.

6th. We except to the extracts read by the court in U. S. vs. York.

7th. If you have that which shows that of previous preparation, they are circumstances that show premeditation, etc.; when you find him in that condition you find the attributes of murder known as malice aforethought.

8th. The facts are such that the law does not palliate or mitigate it; it can only make it murder.

9th. If threats had been made, and he killed him by reason of these threats, and if the evidence shows that the man was unarmed, if you find that state of case, you have that state of case over which he was called by the law to have control.

10th. That a man is propelled by such powers as not to be controllable is not the law.

11th. When a man kills another he lives in another sphere, in the home of the murderer, etc. The human heart was never created as a home for the design to take human life, etc.

65 12th. It is not necessary to find motive for a crime, etc.

13th. We except to the instructions as given by the court from "Wharton on Homicide."

14th. When the killing is done in such a way as to show systematic preparation for such act, and conceals himself and lies in wait, that man is of sound mind; it is not only murder but assassination, etc.

15th. Referring to the society existing in Persia, the society of assassins.

16th. He must have been in such a state of mind as to believe that Sol Blackwell was about to kill him as he was in the field picking cotton.

17th. Except to the instructions as given from the case of U. S. vs. Guiteau.

18th. The testimony of an expert is not to be taken as conclusive, etc. Defendant's conduct may be simulated for a purpose, etc.

19th. Excepts as to reading of court's in regard to expert testimony.

20. Reading as to bias of expert witnesses, etc. They come with such bias that hardly any credit should be given to their testimony, etc.

21. Frequently men unskilled, who have known the person for a long time, are more competent to testify as to the condition of the mind than skilled witnesses who have known the person for but a brief period.

22nd. Threats may go to show the existence of malice aforethought, etc. They cannot go to show an insane delusion.

23rd. Take into consideration that he was picking cotton, etc.; was that an act that could induce defendant to believe that his own life was in danger?

66 24th. We except to the instructions of the court considered as a whole.

25th. We except to the action of the court refusing to give the instructions asked for by defendant.

26th. We except to the ruling of the court in not giving the counsel for defendant sufficient time to review all the instructions given by the court, in order that they could make their exceptions more definite and certain; the court required all exceptions to be filed as soon as the court's instructions to the jury were concluded.

The defendant by his counsel, Mr. Oglesby, then asked the court to give the following instruction, No. 1:

The law presumes the defendant to be sane until the contrary appears, yet if from the whole evidence in the case the jury have a reasonable doubt as to whether or not the defendant was sane or insane at the time he killed the deceased, then he should be acquitted.

Which the court refused to give and to which action of the court the defendant at the time excepted; also asked the court to give instruction No. 2, as follows:

The test to be applied by the jury in determining defendant's sanity and his responsibility for the alleged crime is: Had the defendant the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong? If he had both, and the evidence shows this, he is responsible for his act and would be sane. But if the evidence shows he did not at the time he killed the deceased possess both—that is, the power to distinguish right from wrong, and the power to adhere to
67 the right and avoid the wrong—and this lack of power was on account of unsoundness of mind—mental incapacity—then he would in law be insane to the extent that he ought not to be punished criminally for his act, and ought to be acquitted.

Which the court refused to give, to which action of the court defendant excepted; also asked the court to give instruction No. 3, as follows:

If the jury believe from the whole evidence that the defendant killed the deceased and that such killing was not in necessary self defense, that defendant knew when he shot at deceased death would probably result from the shot, and that he intended that the shot should kill him, but if the jury further believe from the evidence that at the time defendant shot the deceased his reasoning faculties were so far impaired that he was not able to understand the moral character, the general nature and consequence and effect of the act committed by him, or if he was impelled thereto to the commission of the act by an insane impulse which he had not the power to resist, then he would not be guilty of the crime charged against him and he should be acquitted.

Which the court refused to give, to which action of the court the defendant excepted; also asked the court to give the following instruction, No. 4:

If the jury believe from the evidence that defendant did not kill deceased with malice express or implied, and that he did not kill him for revenge or simply because deceased had threatened his life, if such threats are proven, but if they believe from the whole evidence that defendant was impelled to the act by an insane impulse, which the reason that was left him
68 did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, then he would not be guilty of murder.

Which the court refused to give and to which action of the court the defendant excepted at the time. Counsel, through his attorney, Mr. Meyer, asked the court to give the following instruction:

The court instructs the jury, that malice is to be inferred from attendant circumstances which surround transactions, and the jury have a right and it is their duty to look at these attendant circumstances to see what character of act it was, to see what was the condition of the mind of the party or parties who engage in that act, as being one way that they can arrive at the conclusion as to whether it was an act accompanied with malice aforethought, or the convers' of that, in which there was an absence of that element of the crime of murder.

Which the court refused to do and to which action of the court the defendant excepted; also asked the court to give the following instruction:

The court instructs the jury that it is their duty to take into consideration the defendant's conduct at the time of, and immediately following, the killing. The rule given by the law is based upon the conduct of men, and it says that if a man who has taken human life is conscious of his innocence, as a rule, his action and his conduct under that consciousness of innocence will be different from the actions and conduct of a man who is conscious of his guilt, who is conscious of killing without a right, of killing without authority of law. In one case for his own vindication,
69 for his own protection, for the good will and estimation of his fellowmen, he seeks vindication at once; he seeks an uncovering of his act at once; he seeks an investigation of his conduct at once. In the other case, because he is fearful of the consequences, because he is conscious of his act of guilt, he becomes a fugitive, it may be, from justice; he flies from his trial.

Which the court refused to do and to which action of the court the defendant excepted; also asked the court to give the following instruction:

The court instructs the jury, if the defendant was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did not know he was doing what was wrong, he is not a responsible moral agent, and is not criminally responsible for his act.

Which the court refused to do, to which action of the court the defendant at the time excepted.

The jury then retired and returned into court a verdict of guilty, and the defendant filed a motion for a new trial, which motion is as follows, to wit:

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs. } Motion for new trial.
DENNIS DAVIS.

Defendant moves the court to set aside the verdict of the jury in this cause and grant him a new trial because the court erred in refusing to give each of the special instructions asked for by him and refused by the court, being instructions No's. 1, 2, 3, 4, asked for by defendant's counsel Mr. Oglesby, and instructions No. 1, 2, 3, 4, and 5, asked for by defendants counsel, Mr. Meyer.

70 Because the court erred in its general instruction wherein the court charged the jury upon the law of reasonable doubt.

Because the court erred in its charge to the jury upon the question of insanity.

Because the court erred in its charge to the jury as to the testimony of experts and the weight to be given to expert testimony.

Because the court erred in instructing the jury as follows: "So that when, as in this case, insanity is interposed as a defence, the fact of the existence of such insanity at the time of the commission of the offense charged must be established by the evidence to the reasonable satisfaction of a jury, and the burden of proof of insanity rests with the defendant."

"And the fact that the killing may have been an atrocious killing, that it may have been a comparatively motiveless killing, are not facts calculated to show insanity."

Because the court erred in instructing the jury as follows:

"When you start into the trial of a case, as I have already told you, you start in with the presumption of sanity; then comes in the responsibility resting upon the defendant to show his condition, to show his irresponsibility under the law. He is required to show that to your reasonable satisfaction, I say your reasonable satisfaction, that is a state of case where he is excusable for the act."

Because the court erred in permitting witness A. H. Brown to testify about statements made by the defendant on his trial before the commissioner, and in testifying as to the testimony given by the said defendant in his own behalf before the commissioner; because the testimony of the said defendant was reduced to writing by the said commissioner, and
71 this writing is the best evidence of what his testimony was before the commissioner.

Because the verdict is contrary to law.

I. D. OGLESBY,
EMIL MAYER,
Attorneys for defendant.

Which motion was by the court overruled, to which overruling the defendant excepted, and the court in overruling said motion made the following remarks:

72 (Ruling of court on motion for new trial.)

The principal cause that will be noticed by the court in the motion for a new trial in this case is that the court erred in its charge to the jury upon the question of insanity. The charge of the court involved two propositions upon that point. One was that the burden of proof of insanity was upon the defendant. The court in effect declared that the burden of proof was upon the Government as to every proposition in the case, but that the presumption which the law recognizes, that everybody is sane, put the defendant in such an attitude that he was called upon to overcome that presumption. He entered upon the trial of this case with the presumption of sanity against him, or, rather, in his favor, more appropriately speaking. The burden was upon him to overcome that presumption. Now, the question is to what extent he is required to overcome it. To what degree of certainty was he required to prove his insanity? That is a proposition which is very serious in its character. It is claimed
73 by some authorities, and by some courts, that if a party offers sufficient evidence to raise a reasonable doubt of sanity, that he must be held to be insane. Now, Dr. Wharton has undertaken to make a distinction between a case where a party is tried for his insanity, that he may be committed as an insane person, and in a case where he sets up insanity as a defense for crime, or as an excuse for crime. I do not see any ground for any such distinction as that. I do not see why in the one case he should be required to be shown insane to a greater extent than in another. It seems to me that the sensible conclusion to be arrived at is the one embraced in the charge of the court in this case, and that is that it must be proven to the satisfaction of the jury. Now, here is a party standing here asserting insanity, and the jury are required to believe

it or disbelieve it. Are they authorized by the law to believe any proposition that is not established to their satisfaction? It would be a very poor administration of the criminal law if it could be said, either upon one side or the other, that the jury would be authorized to believe a proposition that was not proven to their satisfaction. Now, that substantially, in my judgment, means the same as proving the proposition by a preponderance of the evidence. In the case of Commonwealth *v.* Rogers (41 Am. Dec., 461) the terms "proven by a preponderance of the evidence" and "proved to the satisfaction of the jury" are indiscriminately used by the court. The court in this case said:

"The ordinary presumption is that a person is of sound mind until the contrary appears; and in order to shield one from criminal responsibility, the presumption must be rebutted by proof of the contrary satisfactory to the jury."

74

That was in the charge of the court. The jury, after having been out, and after deliberating upon the case some time, came in, and the court recharged them upon that proposition as follows:

"The jury, after being in consultation several hours, came into court and asked instructions upon these two questions. 'Must the jury be satisfied beyond a doubt of the insanity of the prisoner to entitle him to an acquittal? And what degree of insanity will amount to a justification of the offense?' In answer to the first of these questions the chief justice repeated his former remarks on the same point, and added that if the preponderance of the evidence was in favor of the insanity of the prisoner, the jury would be authorized to find him insane."

Now, in this case, in the first place it will be rem'bered that the defendant filed a motion in which he complained of the court having charged the jury that they should find it by a preponderance of the evidence. The court did not charge that, but I guess it did about the same thing. We have observed in this case (and it is one of the leading questions upon the question of insanity) that the court used the terms indiscriminately. Now, if a proposition is proved to the satisfaction of the jury so they believe it, so they are convinced of it, it seems to me that that is as clear a definition of the extent to which the proof should go as you can express it. In the leading English case upon the subject of insanity, where Mac Naughten was tried, and after his trial and acquittal several propositions were submitted to the judges, and among them was one embracing the idea as to what degree of certainty insanity should be proven, in their answer they said it should be proven to the satisfaction of the jury, and all the well considered cases use this declaration. Mr. Greenleaf lays down the doctrine in the same way. He says if it is proven to the satisfaction of the jury, that that is sufficient. He says (vol. 3, p. 9): "The unsoundness of mind must be established by evidence satisfactory to the jury." Again, on the same subject, Mr. Greenleaf, in the second volume, says:

75

"On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal

acts. If, then, it is proved to the satisfaction of the jury that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree, that, for the time being, it overwhelmed the reason, * * *"

Again:

"In all such cases the jury are to be told that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

76 It is the same principle asserted by all the authorities upon this proposition, with few exceptions. The general trend is that if the proposition is established to that degree of certainty that is sufficient.

In the case of Freeman v. People, 47 Am. Dec., 226, a New York case, it was said:

"Where insanity is interposed as a defense to an indictment for an alleged crime, the inquiry is always brought down to the single question of a capacity to distinguish between right and wrong at the time when the act was done. In such cases the jury should be instructed that it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. * * * In Reg. v. Oxford, 9 Car. & P., 525, Lord Denman, C. J., charged the jury in this manner: 'The question is whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind and was really unconscious, at the time he was committing the act, that it was a crime.'"

Now, in reference to the questions propounded in the MacNaughten Case. The second and third questions asked were:

"What are the proper questions to be submitted to the jury when a person afflicted with insane delusions, respecting one or more particular subjects or persons, is charged with the commission of a crime

77 (murder, for instance), and insanity is set up as a defence?

"In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?

"Answers II and III.—As these two questions appear to us to be more conveniently answered together, we submit our opinion to be that the jury ought to be told, in all cases, that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction. That to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

Thompson on Trials, Sec. 2526, refers to a Missouri case with approbation, and reading from one of these cases, the law is declared by the court charging the jury to be that—

"The law presumes every man, who has arrived at the years of discretion, to be sane, capable of committing crime, until the contrary is shown; so that the State, after proving the unlawful act, need offer no evidence whatever of the sanity of the defendant, but may rest upon the legal presumption of sanity until the defendant shows the contrary. This defense of insanity is emphatically one which the defendant must make out, and it must be made out to the satisfaction of your minds; for if the evidence merely shows a case of doubt, whether the defendant might not be insane, this is not sufficient to authorize an acquittal on that
78 ground only."

The authorities seem to regard this as the best form in which to present this question, and that is the form in which it was presented in this case. The court in its charges, after telling the jury as to the presumption of sanity, said:

"Such insanity, if proved to your reasonable satisfaction to have existed at the time of the commission of the act—that is the test, at the time of its commission—is in the law an excuse for it, however brutal or atrocious it may have been."

That was repeated in the charge, and in addition thereto, the court at the conclusion used language that was sufficiently comprehensive to show that all the propositions necessary to be established to show guilt either by presumption of fact, or by the evidence, must be proven beyond reasonable doubt. That was the effect of the charge of the court, and I do not think there was any error upon that branch of the case.

Now, there were several instructions asked for by the defendant in this case. Some of them, perhaps, may have had some law in them, but the most of them are mere declarations that were not deemed relevant to the issues in this case. Those embracing propositions of law had, in substance, already been given by the court, and it has no other effect than to confuse or confound the jury to repeat these propositions, and the court will avoid it as much as possible hereafter. If propositions asked for by the defense are correct, and have already been given, it is not necessary to declare them more than once. The other propositions were refused upon the ground that they were not relevant to the issues involved in this case.

79 Now, it may be said in this connection, truthfully, I think, that there was never a case in court before where there was slimmer ground, where there was as little ground, for a plea of insanity as there was in this case. The killing by the defendant was one which showed peculiar malignity, and showed a depraved mind, and showed a state of case where a man from some imaginary, or real, grudge, finding the deceased working in the field picking cotton, put himself in ambush, waited until the deceased came out within reasonable shooting distance, and then in the most cowardly and brutal way took his life. There is no phase of insanity arising out of the atrociousness of crime. If there was, there would be hundreds of men who have been tried and convicted in this court who ought to have been acquitted. This was a case of a brutal, wicked murder, without a semblance, in my judgment, of insanity in it, and nothing of that kind connected with it; and such a defence, when offered with-

out reasonable foundation, ought to be disregarded by the courts if they are disposed to enforce the law, rather than to be carried away by this miserable, sickly sentimentality that curses this country to such an extent that innocent human life has no better protection by our institutions than a mule or horse. That is the truth about it. It is a disease of the public mind, which is ready to lay hold of the most frivolous excuse and assert these things in the courts as defenses, and seriously expect that courts sworn to uphold the law and protect innocent human life will observe the request and pay attention to defenses of such a character. This effort upon the part of men engaged in the criminal practice is an effort that is
80 sapping and destroying every vestige of protection that is thrown around innocent human life, and they are aided in it by this sickly sentimentality.

There is no ground for any plea of insanity in this case, in my judgment, and the motion for a new trial will be overruled.

81 All of which proceedings were ordered to be embodied in the bill of exceptions, which is here accordingly done and made a part of the record, and signed by the presiding judge this 16th day of February, 1895.

I. C. PARKER,
U. S. Dist. Judge, holding Circuit Court.

(Endorsed on back:) Filed February 16. 1895. S. Wheeler, clerk, by I. M. Dodge, D. C.

82 *Assignment of Errors.*

In the circuit court of the United States within and for the western district of Arkansas, November term, A. D. 1894.

UNITED STATES }
vs.
DENNIS DAVIS. }

Said defendant alleges that in the record of the proceedings in the above entitled cause there are manifest errors in this, to wit:

The court erred in instructing the jury as follows:

"It presumes every man is sane, and the burden of showing that it is not true is upon the party who asserts it. The responsibility of overturning that presumption that the law recognizes as one that is universal is with the party who sets it up as a defence. The Government is not required to show it. The law presumes that we are all sane; therefore the Government does not have to furnish any evidence to show that this defendant is sane."

The court erred in instructing the jury as follows:

"Such insanity, if proved to your reasonable satisfaction to have existed at the time of the 'ommission of the act—that is the test, at the time of its commission—is, in the law, an excuse for it, however brutal or atrocious it may have been."

The court erred in instructing the jury as follows:

"A person may be afflicted with partial insanity and yet be wholly responsible to the criminal laws of his country for his criminal act. The

law does not excuse in such cases, unless the derangement is so great that it actually renders the person incapable of distinguishing between right and wrong."

The court erred in instructing the jury as follows:

83 "And if the proposition is true, whether it be asserted by science or not, that insanity exists when a man loses his will power under such circumstances, then away with the law; it is a mockery, a sham, and a delusion; it becomes a mere trick to defeat justice, a mere scheme to cover up crime, a mere effort to conceal the criminal act in order that the criminal may again ply his vocation."

The court erred in instructing the jury as follows:

"So that when, as in this case, insanity is interposed as a defense, the fact of the existence of such insanity at the time of the commission of the offense charged must be established by the evidence to the reasonable satisfaction of a jury, and the burden of proof of the insanity rests with the defendant."

The court erred in instructing the jury as follows:

"Therefore, in looking for the existence of insanity you are first to take the presumption that the law recognizes that the defendant comes into the court as a sane man, and the circumstances must be such as to show his insanity to your reasonable satisfaction before that presumption of fact, recognized by law, can be removed. If it is not removed by facts and circumstances it prevails to the end of the case; he is still sane to the end of the case. And the fact that the killing may have been an atrocious killing, that it may have been a comparatively motiveless killing, are not facts calculated to show insanity."

The court erred in giving the following instruction:

"Two conditions have combined to produce a material change in this relation. In the first place it has been discovered that no expert, no matter learned or incorrupt he may be, speaks for his science as a whole. Few specialties are so small as not to be torn by factions, and often

84 the smaller the specialty the bitterer and more inflaming and destroying are the animosities by which these factions are possessed. Peculiarly is this the case in matters psychol*o*logical, in which there is no hypothesis so monstrous that an expert can not be found to swear to it on the stand and to defend it with vehemence when off the stand."

The court erred in instructing the jury as follows:

"In the second place the retaining of experts by a fee proportioned to the importance of their testimony is now, in cases in which they are required, as customary as is the retaining of lawyers. No court would take as authority the sworn statement of the law given by counsel retained by a particular side, for the reason that the most high-minded men are so swayed by an employment of this kind as to lose the power of impartial judgment; and so intense is that conviction that there is no civilized community in which a judge who receives a present from a suitor is not buried in disgrace. Hence it is that apart from the partisan temper more or less common to experts their utterances, now that they have as a class become the retained agents of parties, have lost all judicial authority, and are entitled only to the weight which a sound and cautious criticism would award to such utterances. In adjusting this criticism a large allowance must be made for the bias necessarily belonging to men retained to

advocate a cause, who speak not as to fact, but as to opinion, and who are selected on all moot questions either from their prior advocacy or from their readiness to adopt the opinion to be proved."

The court erred in instructing the jury as follows:

"In this sense we may adopt the strong language of Doctor Campbell, that 'skilled witnesses come with such a bias on their minds to support the cause in which they are embarked, that hardly weight should be given to their evidence.'"

85

The court erred in instructing the jury as follows:

"That is the figure the threats cut in the case, except in a case like this, it may be taken to show such deliberation or previous preparation, to show such design as thought of beforehand, taken in connection with the act, hiding or lying in wait; they may be taken into consideration by you to find the existence of malice aforethought, the existence of a premeditated design to slay, and the preconceived purpose to seek a weapon with which the slaying could be done, and a place where he could hide and do the act without danger to himself. These threats may be taken into consideration for that purpose."

The court erred in instructing the jury as follows:

"When you start into the trial of a case, as I have already told you, you start in with the presumption of sanity. Then comes in the responsibility resting upon the defendant to show his condition, to show his irresponsibility under the law. He is required to show that to your reasonable satisfaction—I say your reasonable satisfaction—that it is a state of case where he is excusable for the act."

Because the court refused to give the following instructions:

1. The law presumes the defendant to be sane until the contrary appears, yet if from the whole evidence in the case the jury have a reasonable doubt as to whether or not the defendant was sane or insane at the time he killed the deceased, then he should be acquitted.

The court refused to give the following instruction:

2. The test to be applied by the jury in determining defendant's sanity and his responsibility for the alleged crime is: Had the defendant the power to distinguish right from wrong and the power to adhere to the right and avoid the wrong? If he had both, and the evidence shows this, he is responsible for his act and would be sane. But if the evidence shows he did not at the time he killed the deceased possess both—that is, both the power to distinguish right from wrong and the power to adhere to the right and avoid the wrong, and this lack of power was on account of unsoundness of mind, mental incapacity—then he would in law be insane to the extent that he ought not to be punished criminally for his act and ought to be acquitted.

86

The court erred in refusing to give the following instruction:

3. If the jury believe from the whole evidence that the defendant killed the deceased and that such killing was not in necessary self-defense, that defendant knew when he shot at deceased death would probably result from the shot, and that he intended that the shot should kill him, but if the jury further believe from the evidence that at the time the defendant shot the deceased his reasoning faculties were so far impaired that he was not able to understand the moral character, the general consequence and effect, of the act committed by him, or if he was impelled thereto to

the commission of the act by an insane impulse which he had not the power to resist, then he would be guilty of the crime charged against him and he should be acquitted.

The court erred in refusing to give the following instruction:

4. If the jury believe from the evidence that the defendant did not kill the deceased with malice express or implied, and that he did not kill him for revenge or simply because deceased had threatened his life, if such threats are proven, but if they believe from the whole evidence that
87 defendant was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, then he would not be guilty of murder.

The court erred in refusing to give the following instruction, asked for by defendant's counsel:

The court instructs the jury that malice is to be inferred from attendant circumstances which surround transactions, and the jury have a right, and it is their duty, to look at these attendant circumstances to see what character of act it was; to see what was the condition of the mind of the party or parties who engage in that act, as being one way that they can arrive at the conclusion as to whether it was an act accompanied with malice aforethought, or the converse of that, in which there was an absence of that element of the crime of murder.

The court erred in refusing to give the following instructions, asked for by defendant's counsel:

The court instructs the jury that it is their duty to take into consideration the defendant's conduct at the time of and immediately following the killing. The rule given by the law is based upon the ordinary conduct of men, and it said that if a man who has taken human life is conscious of his innocence, as a rule, his action and his conduct under that consciousness of innocence will be different from the actions and conduct of a man who is conscious of his guilt—who is conscious of killing without a right, of killing without authorit' of law. In one case, for his own vindication, for his own protection, for the good will and estimation of his fellow-
men, he seeks vindication at once; he seeks an uncovering of his
88 act at once; he seeks an investigation of his conduct at once. In the other case, because he is fearful of the consequences, because he is conscious of his act of guilt, he becomes a fugitive, it may be, from justice; he flies from his trial.

The court erred in refusing to give the following instruction, asked for by defendant's counsel:

The court instructs the jury, if the defendant was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did not know he was doing what was wrong, he is not a responsible moral agent, and is not criminally responsible for his act.

The court erred in refusing ti give the following instruction, asked for by defendant's counsel:

The court instructs the jury, if the testimony discloses that at the time of doing the act charged the defendant was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act,

and that he would not have done the act but for that affection, he should be acquitted.

The court erred in permitting Witness A. H. Brown to testify as to what defendant stated as a witness in his own behalf on his trial before the United States commissioner; the testimony of said Brown being as follows, to wit:

"That he was present at the trial by the U. S. commissioner; that the defendant was introduced as a witness in his own behalf, being first cautioned by the commissioner that he was not required to give evidence unless he desired to do so, and cautioned that he had better not say anything because what he said could be used against him. After then being thus cautioned, the defendant was sworn as a witness and stated that
89 he killed the deceased; that he had cleared up a little patch of cane and there was no understanding and he (defendant) made up his part and Blackwell told him that if he did not make up his (Blackwell's) part he would kill him; that he (defendant) staid in his house all day and night afraid to go out, and the next day he saw Blackwell picking cotton in the field and he slipped out and got a gun and shot him."

DENNIS DAVIS,
By IRA D. OGLESBY,
EMIL MEYER,
His Attorneys.

(Endorsed on back:) Filed in open court Mar. 8, 1895. S. Wheeler, clerk.

90 *Petition for writ of error.*

United States circuit court, western district of Arkansas.

UNITED STATES }
vs. } Murder.
DENNIS DAVIS. }

To the clerk of the circuit court of the United States for the western district of Arkansas:

Your petitioner, Dennis Davis, represents that at the November term, 1894, of said court he was convicted on an indictment charging him with the crime of murder, and that the said court pronounced judgment and sentence of death upon his petitioner upon the verdict of the jury convicting him as aforesaid. Your petitioner alleges that in the record and proceedings in the trial of said cause there is great and manifest error, to the prejudice and great damage of your petitioner. He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court in said cause, removing said cause and the record therein to the said Supreme Court in order that the same may be there examined, and, if error be found, that judgment and sentence against him therein may be reversed.

DENNIS DAVIS.
By IRA D. OGLESBY,
EMIL MEYER,
His Attorneys.

(Endorsed on back:) Filed in open court Mar. 8, 1895. S. Wheeler, clerk.

91 In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs.
DENNIS DAVIS. } Murder.

I, Dennis Davis, the defendant in the above-entitled cause, hereby upon oath do state that I am not worth ten dollars ($10.00) over and above my wearing apparel; that I am a poor person and unable to pay the costs and expenses of an appeal in the above-entitled case, and pray that I may be permitted to prosecute said appeal without the paying of the costs.

DENNIS DAVIS.

Attest:
JAMES CAPPS.

Sworn and subscribed to before me this 5th day of March, A. D. 1895.

STEPHEN WHEELER, *Clerk.*
By J. D. BERRY, *D. C.*

(Endorsed on back:) Filed in open court Mar. 8, 1895. S. Wheeler, clerk.

92 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the circuit greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The United States, plaintiff, and Dennis Davis, dft., a manifest error hath happened, to the great damage of the said Dennis Davis, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 60 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 25 day of March, in the year of our Lord one thousand eight hundred and ninety-five.

STEPHEN WHEELER,
Clerk of the Circuit Court of the United States for the Western Dist. of Ark.
By I. M. DODGE, *D. C.*

Allowed by

Justice of the Supreme Court of the United States.

93 THE UNITED STATES OF AMERICA.

To James F. Read, U. S. dist. attorney for the western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court at the city of Washington, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, wherein Dennis Davis, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable I. C. Parker, judge of the district court of the United States for the western district of Arkansas, this 25th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

I. C. PARKER,
United States District Judge for the Western District of Arkansas.

I, Jas. F. Read, U. S. attorney for the western district of Arkansas, hereby acknowledge service and waive service by an officer of the within citation.

Ft. Smith, Ark., Apr. 5th, 1895.

JAMES B. MCDONOUGH,
Asst. U. S. Dist. Atty. for the Western Dist. of Arkansas.

94 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record and proceedings in the case of U. S. vs. Dennis Davis, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court at Fort Smith, in said district, this 8th day of April, A. D. 1895.

[SEAL.] STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

(Indorsement on cover:) Case No. 15870. Term No. 986. Dennis Davis, plff. in error vs. The United States. W. Arkansas. C. C. U. S. Filed April 13, 1895.

FILED.
OCT 28 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE LAW ASSOCIATION
OF
PHILADELPHIA

DENNIS DAVIS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 593.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

DENNIS DAVIS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 593.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Defendant was indicted at the August term, A. D. 1894, in the western district of Arkansas, for the murder of Sol. Blackwell, a negro, and not an Indian.

There was no controversy about the fact that the defendant procured a gun and stealthily approached to within 15 or 20 yards of the deceased and shot him while he was picking cotton, and immediately ran away.

The defense was based upon alleged partial insanity.

One witness, Dr. Wright, was introduced as an expert in behalf of defendant, and several nonexpert witnesses who had known defendant were introduced.

Defendant was found guilty of murder in the first degree and was sentenced to be hanged.

POINTS AND ARGUMENT.

I.

First, second, fifth, sixth, eleventh, and twelfth assignments.

It is assigned as error that the court refused to instruct the jury as follows:

> The law presumes the defendant to be sane until the contrary appears, yet if from the whole evidence in the case the jury have a reasonable doubt as to whether or not the defendant was sane or insane at the time he killed the deceased, then he should be acquitted. (Rec., p. 44.)

The first, second, fifth, sixth, and eleventh assignments, which appear on pages 42, 43, and 44 of the record, all fall within the discussion under the foregoing, which is the twelfth ground assigned.

The court had instructed the jury that—

> Such insanity, if proved to your reasonable satisfaction to have existed at the time of the commission of the act—that is the test—at the time of its commission, is in the law an excuse for it, however brutal or atrocious it may have been. (Rec., p. 23.)

And as follows:

> So that when, as in this case, insanity is interposed as a defense, the fact of the existence of such

> insanity at the time of the commission of the offense charged must be established by the evidence to the reasonable satisfaction of a jury, and the burden of proof of the insanity rests with the defendant. (Rec., p. 24.)

He also charged as follows:

> You are to be satisfied beyond a reasonable doubt of the guilt of this defendant before you convict. When you start into a trial of a case, as I have already told you, you start in with the presumption of sanity. Then comes in the responsibility resting upon the defendant to show his condition—to show his irresponsibility under the law. He is required to show that—to your reasonable satisfaction, I say, to your reasonable satisfaction—that it is a state of case where he is excusable for the act.
>
> It is for you to say now what is the state of case established.
>
> If you are satisfied beyond a reasonable doubt of the guilt of this defendant, as charged in this indictment, your duty is to convict him. If you are not satisfied to that extent your duty is to acquit him. That means that, as reasonable men, after having heard the law defining the crime and the law indicating when he may be excusable for his acts and the evidence in the case, you have a doubt for which good reasons can be given. (Rec., pp. 32–33.)

Thus, while the court declined to charge the request as given, he, in substance, charged that the presumption of sanity stood until rebutted by proof, the burden of producing which was upon the defendant, and that if they had a reasonable doubt they should acquit. This reasonable doubt went to every fact and circumstance that went to make up the crime, and to facts set up in defense.

One witness, Dr. Wright, was introduced as an expert in behalf of defendant, and several nonexpert witnesses who had known defendant were introduced.

Defendant was found guilty of murder in the first degree and was sentenced to be hanged.

POINTS AND ARGUMENT.

I.

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And as follows:

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>
> It is for you to say now what is the state of case established.
>
> If you are satisfied beyond a reasonable doubt of the guilt of this defendant, as charged in this indictment, your duty is to convict him. If you are not satisfied to that extent your duty is to acquit him. That means that, as reasonable men, after having heard the law defining the crime and the law indicating when he may be excusable for his acts and the evidence in the case, you have a doubt for which good reasons can be given. (Rec., pp. 32–33.)

Thus, while the court declined to charge the request as given, he, in substance, charged that the presumption of sanity stood until rebutted by proof, the burden of producing which was upon the defendant, and that if they had a reasonable doubt they should acquit. This reasonable doubt went to every fact and circumstance that went to make up the crime, and to facts set up in defense.

The charge above set out is that they must look to all of the facts, including those making defendant excusable for his acts, and that if upon the whole case they have a reasonable doubt of guilt they must acquit.

The act being admitted the charge as to reasonable doubt covered the question of malice and will.

If it be considered that the charge does not bear this interpretation, and that the general charge upon reasonable doubt was not applicable to the question of insanity, then the question is presented, whether or not, taking the charge in its other aspect, the court erred in saying that the defendant must establish insanity to the reasonable satisfaction of the jury.

There is much conflict of authority on the proposition as to whether the judge should charge the jury that they must acquit if the whole evidence raises a reasonable doubt in their minds as to whether the defendant is sane or not.

The doctrine in England is well settled that the burden is on the defendant to establish his insanity to the reasonable satisfaction of the jury. (Russell on Crimes, 9th ed., 525; Roscoe on Criminal Evidence, 7th ed., 975; Foster's Crown Law, 225.)

In Daniel McNaughten's Case (10 Clark & Finnelly, 200), the question of insanity as a defense in criminal cases having been made the subject of debate in the House of Lords, the opinion of the judges on the law governing such cases was taken, and on the point here involved the answer was that "the jurors ought to be told that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction."

The law so declared has been acquiesced in in England.

In this country there are two lines of authorities. The following hold the doctrine that the burden of proof is on the defendant to establish insanity to the reasonable satisfaction of the jury, some of the cases using the language that it must be established by a preponderance of the evidence. These authorities will all be cited together as adverse to the contention that only a reasonable doubt must be raised:

Rice's Criminal Evidence, vol. 3, sec. 398, 399.
Wharton on Homicide, sec. 668.
Wharton on Criminal Evidence, sec. 340.
Wharton on Criminal Law, 7th ed., sec. 54.
Greenleaf on Evidence, vol. 2, sec. 373; vol. 3, sec. 5.

Alabama:
Boswell v. *State*, 63 Ala., 307;
Parsons v. *State*, 81 Ala., 577;
Gunter v. *State*, 83 Ala., 96;
Maxwell v. *State*, 89 Ala., 150.

Arkansas:
Coates v. *State*, 50 Ark., 330;
Bolling v. *State*, 54 Ark., 588.

California:
People v. *McDonell*, 47 Cal., 134;
People v. *Boden*, 90 Cal., 195;
People v. *Travers*, 88 Cal., 238;
People v. *Bemmerly*, 98 Cal., 299.

Georgia:
Fogarty v. *State*, 80 Ga., 450, 455.

Iowa:
State v. *Bruce*, 48 Ia., 533;
State v. *Trout*, 74 Ia., 545.

Kentucky:
Kriel v. *Commonwealth*, 5 Bush., 362;
Moore v. *Commonwealth*, 18 S. W. Rep., 833.
Louisiana:
State v. *Coleman*, 27 La. Ann., 691;
State v. *Burns*, 25 La. Ann., 302;
State v. *De Rancé*, 34 La. Ann., 186.
Maine:
State v. *Lawrence*, 57 Me., 574.
Massachusetts:
Commonwealth v. *Rodgers*, 7 Metc., 500;
Commonwealth v. *Eddy*, 7 Gray, 583.
Minnesota:
State v. *Hanley*, 34 Minn., 430.
Missouri:
State v. *McCoy*, 34 Mo., 534;
State v. *Rademeier*, 71 Mo., 173;
State v. *Pagels*, 92 Mo., 300;
State v. *Schaefer*, 22 S. W. Rep., 447.
Nevada:
State v. *Lewis*, 20 Nev., 333.
New Jersey:
State v. *Spencer*, 1 Zabriskies, 196.
North Carolina:
State v. *Starling*, 6 Jones, 366;
State v. *Vann*, 82 N. C., 631;
State v. *Davis*, 109 N. C., 780.
Ohio:
Loeffner v. *State*, 10 Oh. St., 598;
Bond v. *State*, 23 Oh. St., 349.
Pennsylvania:
Com'l v. *Mohler*, 4 Barr, 266;
Ortwein v. *Com.*, 76 Pa. St., 414;
Pannell v. *Com.*, 86 Pa. St., 260;
Commonwealth v. *Gerade*, 145 Pa. St., 289.

South Carolina:
State v. *Bundy*, 24 S. C., 439;
State v. *Alexander*, 30 S. C., 74.
Texas:
Webb v. *State*, 9 Tex. App., 490;
Leache v. *State*, 22 Tex., 279.
Utah:
People v. *Dillon*, 8 Utah, 92.
Virginia:
Baccigalupo v. *Com.*, 33 Gratt., 807.
West Virginia:
State v. *Strauder*, 11 W. Va., 747.

The following hold that if the evidence raises a reasonable doubt of sanity the jury must acquit:

Thompson on Trials, sec. 2524;
2 Bishop's Criminal Procedure, secs. 669, 673.
United States courts:
United States v. *Guiteau*, 10 F. R., 161;
United States v. *Ridgeway*, 31 F. R., 149;
United States v. *Faulkner*, 35 F. R., 730;
United States v. *McClure*, 7 Law Reporter, 439;
United States v. *Lancaster*, 7 Biss., 440.
Connecticut:
State v. *Johnson*, 40 Conn., 136.
Florida:
Hodge v. *State*, 26 Fla., 11.
Illinois:
Hopps v. *People*, 31 Ill., 385;
Chase v. *People*, 40 Ill., 353;
Dunn v. *People*, 109 Ill., 635;
Langdon v. *People*, 133 Ill., 382.
Indiana:
Bradley v. *State*, 31 Ind., 492;
Geutig v. *State*, 66 Ind., 94;
Grubb v. *State*, 117 Ind., 277;
Plake v. *State*, 121 Ind, 433.

Iowa:
State v. *Jones*, 64 Ia., 349.
Kansas:
State v. *Crawford*, 11 Kans., 32;
State v. *Mahn*, 25 Kans., 186;
State v. *Nixon*, 32 Kans., 205.
Kentucky:
Smith v. *Commonwealth*, 1 Duval, 224.
Michigan:
People v. *Garbutt*, 17 Mich., 9;
Underwood v. *People*, 32 Mich., 1.
Mississippi:
Cunningham v. *State*, 56 Miss., 269.
Nebraska:
Wright v. *People*, 4 Neb., 407.
New Hampshire:
State v. *Bartlett*, 43 N. H., 224;
State v. *Jones*, 50 N. H., 369;
State v. *Pike*, 49 N. H., 399.
New Mexico:
Falkner v. *Territory*, 30 Pac. Rep., 905.
New York:
Brotherton v. *People*, 75 N. Y., 162;
O'Connell v. *People*, 87 N. Y., 377;
Walker v. *People*, 88 N. Y., 81.
Tennessee:
Dove v. *State*, 3 Heisk., 348;
King v. *State*, 91 Tenn., 617.
Wisconsin:
Revoir v. *State*, 82 Wis., 295;
State v. *Reidell*, 14 Atlantic Reporter, 550.

Thus it appears that the preponderance of authority is against the contention that it is only necessary to raise a reasonable doubt.

It is urged by those authorities holding the contrary doctrine that every element necessary for conviction must be established beyond a reasonable doubt; that while there is a presumption of sanity, this only goes to the extent of relieving the State of the burden of proving sanity, and without any proof on the subject the presumption is conclusive, but that when proof is introduced, inasmuch as malice and will could not exist in the mind of a person insane, evidence establishing a reasonable doubt as to the sanity of the defendant in effect establishes a reasonable doubt as to whether there were malice and the operation of the will.

Nowhere has this doctrine been stated with more force than by Chief Justice Nicholson in *Dove* v. *The State* (3 Heisk., 366–374).

The reasoning upon which the opposite conclusion is based is that sanity is the normal condition and that there is a presumption that every person is sane, and this presumption stands until it is overthrown, and that evidence which merely raises a reasonable doubt of sanity does not overthrow this presumption.

There is a difference, growing out of the well-established rules of law based on public policy, between the doubt of guilt and the doubt of insanity. Malice is presumed from certain facts and persons are held responsible for the consequences of their acts upon the principle of presumption. These presumptions are fixed rules established by public policy and not by the reasoning upon each particular case. The rule, which has been enforced, that drunkenness is not an excuse for crime grows out of

public policy. Fixed rules of law, established by public policy like this, are not to be subjected to the refinements of reasoning growing out of the facts of particular cases.

It has been said that statistics show that a majority of the persons acquitted on the ground of insanity were not insane, and this even in England, where the strongest rule against the defendant prevails. The probability of a jury finding an insane man guilty, under the rule that insanity must be established to their reasonable satisfaction, is very slight as compared with the evil that results to society from the application of the doctrine that a reasonable doubt as to whether the defendant is sane or insane must be followed by acquittal.

It is urged, with great force of logic, which overlooks public policy and applies to the question of insanity the same reasoning which has been accepted in establishing the doctrine of reasonable doubt in respect of the affirmative facts necessary to be proven by the State to establish crime, that sanity when put in issue by any evidence must be established beyond a reasonable doubt. It is submitted that a substantial ground for differentiation exists. This has been presented by Attorney-General Heiskell in the Dove Case, as follows:

> That doubt of insanity and doubt of guilt do not stand on the same footing. Rules of law are not matters of simple logical consistency. Policy influences them. Every man is presumed to know the law; to contemplate the consequences of his acts; malice is presumed from the use of a deadly weapon or from the fact of killing; not because courts suppose these things are universally true in fact, but that policy demands their adoption. Policy, not

logic, is the foundation of the rule as to drunkenness, that it shall not excuse crime. The legal reason for it is, logically, nonsense; practically, wise. The same policy demands that we shall adhere to the English rule as to proof of insanity, not make a new one, as the courts of other States have done.

The defendant can not be sent to an insane asylum on a doubt as to his insanity. He must, therefore, in all doubtful cases, be turned loose upon the country.

The question is one that has not been passed upon by this court. The nisi prius Federal courts have held to the doctrine of reasonable doubt.

II.

THIRD ASSIGNMENT.

The third assignment is as follows:

> The court erred in instructing the jury as follows: "A person may be afflicted with partial insanity and yet be wholly responsible to the criminal laws of his country for his criminal act. The law does not excuse in such cases unless the derangement is so great that it actually renders the person incapable of distinguishing between right and wrong." (Rec., pp. 42, 43.)

The foregoing is an excerpt wrested from its connection. In the charge it is qualified by what precedes and what comes after. The context is as follows:

> For a person to be excused from criminal responsibility it is not necessary that he be a raving maniac, but ordinarily it requires something more than mere eccentricity of a natural character. Such insanity does not excuse. A person may be afflicted with partial insanity and yet be wholly responsible to the

criminal laws of his country for his criminal act. The law does not excuse in such cases unless the derangement is so great that it actually renders the person incapable of distinguishing between right and wrong. Now, it may be well in this connection to inquire what is meant by knowing the right from the wrong with reference to the particular act charged against the defendant. The law assumes the existence of the power of consciousness for persons of ordinary intelligence or capacity to distinguish between right and wrong in reference to particular actions. If the defendant was incapable of knowing the right from the wrong with reference to the particular act charged against him, or unconscious at the time of the nature of the act, or if he was deprived of his will power to such an extent as to render him at the time unable to control his passions, he would be excusable. (Rec., p. 23.)

This is a correct statement of the law.

III.

FOURTH ASSIGNMENT.

To the fourth assignment (Rec., p. 43) there was no exception taken at the trial. See all of the 41 exceptions set out on pages 33–35.

IV.

SEVENTH, EIGHTH, AND NINTH ASSIGNMENTS.

The seventh assignment is as follows:

The court erred in giving the following instruction:

"Two conditions have combined to produce a material change in this relation. In the first place it has been discovered that no expert, no matter how

learned or incorrupt he may be, speaks for his science as a whole. Few specialties are so small as not to be torn by factions, and often the smaller the specialty the bitterer and more inflaming and destroying are the animosities by which these factions are possessed. Peculiarly is this the case in matters psychological, in which there is no hypothesis so monstrous that an expert can not be found to swear to it on the stand and to defend it with vehemence when off the stand." (Rec., p. 43.)

The eighth assignment is as follows:

The court erred in instructing the jury as follows:

"In the second place, the retaining of experts by a fee proportioned to the importance of their testimony is now, in cases in which they are required, as customary as is the retaining of lawyers. No court would take as authority the sworn statement of the law given by counsel retained by a particular side, for the reason that the most high-minded men are so swayed by an employment of this kind as to lose the power of impartial judgment; and so intense is that conviction that there is no civilized community in which a judge who receives a present from a suitor is not buried in disgrace. Hence it is that apart from the partisan temper, more or less common to experts, their utterances, now that they have as a class become the retained agents of parties, have lost all judicial authority, and are entitled only to the weight which a sound and cautious criticism would award to such utterances. In adjusting this criticism a large allowance must be made for the bias necessarily belonging to men retained to advocate a cause who speak not as to fact, but as to opinion, and who are selected on all moot questions either from their prior advocacy or from their readiness to adopt the opinion to be proved." (Rec., p. 43.)

The ninth assignment is as follows:

> The court erred in instructing the jury as follows: "In this sense we may adopt the strong language of Dr. Campbell, that 'skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence.'" (Rec., p. 44.)

The seventh exception (Rec., p. 34) is as follows:

> The defendant excepts to that portion of the charge where the court says the opinions of scientific men are not good common sense, etc.

The thirteenth exception (Rec., p. 34) is as follows:

> The defendant excepts to that part of the court's charge where reference is made to expert testimony. Defendant wants to except to the whole of that portion of the charge on the subject of expert testimony. Also excepts to the wording of the declaration of Lord Campbell on the subject of experts or expert testimony.

The eighteenth exception (Rec., p. 35) is as follows:

> The testimony of an expert is not to be taken as conclusive, etc. Defendant's conduct may be simulated for a purpose, etc.

The twentieth exception (Rec., p. 35) is as follows:

> Reading as to bias of expert witnesses, etc. They come with such bias that hardly any credit should be given to their testimony, etc.

It is insisted that these are the only exceptions which have any bearing upon the above assignments, and that they are too general to be noticed.

V.

TENTH ASSIGNMENT.

The tenth assignment (Rec., p. 44) is as follows:

> The court erred in instructing the jury as follows: "That is the figure the threats cut in the case, except in a case like this it may be taken to show such deliberation or previous preparation, to show such design as thought of beforehand, taken in connection with the act, hiding or lying in wait; they may be taken into consideration by you to find the existence of malice aforethought, the existence of a premeditated design to slay, and the preconceived purpose to seek a weapon with which the slaying could be done and a place where he could hide and do the act without danger to himself; these threats may be taken into consideration for that purpose."

The charge in the record, as in *Brown* v. *United States* (150 U. S., 94), differs materially from the passage as set out in the assignment, and is as follows:

> That is the figure the threats cut in the case, except in a case like this. If you believe from the evidence that defendant did the killing on account of the threats, they may be taken to show such deliberation or previous preparation, to show such design as thought of beforehand, taken in connection with the act, hiding or lying in wait, they may be taken into consideration by you to find the existence of malice aforethought, the existence of a premeditated design to slay, and the preconceived purpose to seek a weapon with which the slaying could be done, and a place where he could hide and do the

act without danger to himself; these threats may be taken into consideration for that purpose. (Rec., p. 32.)

The words "*If you believe from the evidence that defendant did the killing on account of the threats*" are omitted from what the assignment purports to quote from the charge. The charge as given is sound.

VI.

THIRTEENTH, FOURTEENTH, FIFTEENTH, AND EIGHTEENTH ASSIGNMENTS.

Thirteenth:

The court refused to give the following instruction:

"2. The test to be applied by the jury in determining defendant's sanity and his responsibility for the alleged crime is: Had the defendant the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong? If he had both, and the evidence shows this, he is responsible for his act and would be sane. But if the evidence shows he did not at the time he killed the deceased possess both, that is, both the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong, and this lack of power was on account of unsoundness of mind—mental incapacity—then he would in law be insane to the extent that he ought not to be punished criminally for his act, and ought to be acquitted." (Rec., p. 44.)

Fourteenth:

The court erred in refusing to give the following instruction:

"3. If the jury believe from the whole evidence that the defendant killed the deceased and that

such killing was not in necessary self-defense, that defendant knew when he shot at deceased death would probably result from the shot, and that he intended that the shot should kill him, but if the jury further believe from the evidence that at the time the defendant shot the deceased his reasoning faculties were so far impaired that he was not able to understand the moral character, the general consequence and effect, of the act committed by him, or if he was impelled thereto to the commission of the act by an insane impulse which he had not the power to resist, then he would not be guilty of the crime charged against him, and he should be acquitted." (Rec., pp. 44, 45.)

Fifteenth:

The court erred in refusing to give the following instruction:

"4. If the jury believe from the evidence that the defendant did not kill the deceased with malice, express or implied, and that he did not kill him for revenge or simply because deceased had threatened his life, if such threats are proven, but if they believe from the whole evidence that defendant was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, then he would not be guilty of murder." (Rec., p. 45.)

Eighteenth:

The court erred in refusing to give the following instruction asked for by defendant's counsel:

"The court instructs the jury, if the defendant was laboring under such a defect of reason from disease

of the mind as not to know the nature and quality of the act he was doing, or if he did not know he was doing what was wrong, he is not a responsible moral agent, and is not criminally responsible for his act." (Rec., p. 45.)

The court charged the jury as follows:

> The defendant interposes the plea of insanity, and he says by this plea that he did the killing, but the act is not one for which he can be held responsible; in other words, that the act was and is excusable in the law because he was insane at the time of its commission. Now, I say to you in this connection, and it is a fact admitted in argument by the counsel, that under the evidence there is nothing that justifies the act of the killing, nor was it such an act that the law upholds it or mitigates it or reduces it to a grade lower than murder. If it was committed by the defendant while he was actually insane it is excusable. (Rec., pp. 22, 23.)
>
> * * * * *
>
> Now, I will undertake or endeavor to tell you, and I bespeak your most earnest attention, especially upon this proposition of "insanity." The term "insanity," as used in this defense, means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong or unconscious at the time of the nature of the act he is committing; or where, though conscious of the nature of the act and able to distinguish between right and wrong, and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been, otherwise than voluntarily, so completely destroyed that his actions are not subject to it, but are beyond his control. (Rec., p. 23.)
>
> * * * * *

For a person to be excused from criminal responsibility it is not necessary that he be a raving maniac, but ordinarily it requires something more than mere eccentricity of a natural character. Such insanity does not excuse. A person may be afflicted with partial insanity and yet be wholly responsible to the criminal laws of his country for his criminal act. The law does not excuse in such cases unless the derangement is so great that it actually renders the person incapable of distinguishing between right and wrong. Now, it may be well in this connection to inquire what is meant by knowing the right from the wrong with reference to the particular act charged against the defendant. The law assumes the existence of the power of consciousness for persons of ordinary intelligence or capacity to distinguish between right and wrong in reference to particular actions. If the defendant was incapable of knowing the right from the wrong with reference to the particular act charged against him, or unconscious at the time of the nature of the act, or if he was deprived of his will power to such an extent as to render him at the time unable to control his passions, he would be excusable. And when I say "deprived of his will power" I mean not that he has voluntarily thrown it off and abandoned himself to his passions or his whims. (Rec., p. 23.)

* * * * *

I mean, not that he has voluntarily thrown it off and abandoned himself to the domination of his passions or his whims, but that by disease or some other cause over which he had no control, it has been wrested from him. (Rec., p. 24.)

* * * * *

Although you may believe and find from the evidence that the defendant did commit the act charged

against him, yet, if you further find that at the time he did so he was in such an insane condition of mind that he did not and could not understand and comprehend the nature of the act, or that thus knowing and understanding it, he was so far deprived of his will, not by his own passion conceived for the purpose of spurring him on to commit the violence, not by his own passion of mind engendered by some real or fancied grievance, but that he was so far deprived of his will by disease or other cause over which he had no control as to render him unable to control his actions, then such killing was not a malicious killing, and you will acquit him of the crime charged against him. (Rec., p. 25.)

* * * * *

Now, there is such a condition recognized by the law as that a man may act under an insane delusion and be regarded as insane. It is necessary that the doctrine of the law upon this subject should be given with great care that we may know what is meant by it. You would naturally inquire what is meant by "insane delusion." If a man thinks he can kill—thinks he has a right to kill—and shoots a man down, is that an insane delusion? Not at all. That is not the proposition. If a man has a conception that somebody at the time of the killing, that the man whom he kills, is then and there at that time attempting his life, when such is not the fact, there is no foundation for it, and he kills under that delusion, that is evidence of mental derangement of such degree that it may be taken as insanity. But if the man had made threats against him, and he was acting upon the idea that he could kill because of the threats, he has made a mistake as to the law and it is no insane delusion. That is not an insane delusion; that is a misconception of legal

right and it is not evidence of insanity. He may not have been correct in his judgment of his rights, but the law presumes that he knows the law, and he does, because every man does who is under the legal presumption of sanity until that presumption is overthrown. That is not what is meant by an insane delusion. (Rec., pp. 27, 28.)

There is no essential difference between the requests and what the court had already charged.

VII.

SIXTEENTH ASSIGNMENT.

The sixteenth assignment is as follows:

"The court erred in refusing to give the following instruction, asked for by defendant's counsel:

"The court instructs the jury that malice is to be inferred from attendant circumstances which surround transactions, and the jury have a right, and it is their duty, to look at these attendant circumstances to see what character of act it was; to see what was the condition of the mind of the party or parties who engage in that act, as being one way that they can arrive at the conclusion as to whether it was an act accompanied with malice aforethought or the converse of that, in which there was an absence of that element of the crime of murder." (Rec., p. 45.)

The court charged as follows:

Malice aforethought means the doing of a wrongful act. When we come to acts of this kind which result in death, without just cause or excuse, or in the absence of anything which would mitigate the crime—that is to say, that the party had no ground

> to kill in self-defense, or when the crime could not be reduced in grade because of the conduct at the time of the killing of the party who was killed—in the absence of these two conditions, when the evidence shows, first, the seeking of an opportunity; secondly, the preparation of deadly means; thirdly, lying in wait in order that he might be where the deadly missile could be sent through the body of the victim—I say, where you find this and there is the mental condition known as "sanity," you have malice aforethought, because you have the doing of a wrongful act without just cause or excuse, or in the absence of mitigating facts, which produce death. Therefore the law lays it down. Associate Justice Field lays it down in the case I have read to you, that where you have a willful killing and an intentional killing, where you have a killing which shows the means that were used to produce that result, which shows the systematic selection and preparation of a deadly agency in the shape of a gun, the selection of a location and hiding in ambush; with these attendant circumstances of the act you have that which shows deliberation, you have that which shows premeditation, you have that which shows thought of beforehand, and therefore you have that which is malice aforethought, which shows the existence of that terrible thing which characterizes a killing and makes it murder, known as the taking of human life without just cause or excuse, or in the absence of mitigating facts. (Rec., p. 20.)

It is insisted that this part of the charge was correct and fully covered what was subsequently presented in the request.

VIII.

SEVENTEENTH ASSIGNMENT.

The seventeenth assignment is as follows:

> The court erred in refusing to give the following instructions, asked for by defendant's counsel:
>
> "The court instructs the jury that it is their duty to take into consideration the defendant's conduct at the time of and immediately following the killing. The rule given by the law is based upon the ordinary conduct of men, and it says that if a man who has taken human life is conscious of his innocence, as a rule his action and his conduct under that consciousness of innocence will be different from the actions and conduct of a man who is conscious of his guilt, who is conscious of killing without a right, of killing without authority of law. In one case, for his own vindication, for his own protection, for the good will and estimation of his fellow-men, he seeks vindication at once; he seeks an uncovering of his act at once; he seeks an investigation of his conduct at once. In the other case, because he is fearful of the consequences, because he is conscious of his act of guilt, he becomes a fugitive, it may be, from justice; he flies from his trial." (Rec., p. 45.)

This request would have been relevant if there had been any defense of justification. Where killing is done accidentally, or the homicide, for any reason, is excusable in law, the conduct of the defendant at the time of and immediately following the killing is relevant for establishing the facts which go to make up such a defense. In this case, however, the defense was based alone on insanity, and, therefore, all actions which, in respect of

a sane person, would go to establish innocence are entirely irrelevant. Here it was not a question of what he intended to do, or of the innocence of the act as shown in the light of his conduct, but whether he was legally responsible for what he did. Attendant and subsequent acts might be relevant to the question as to whether or not he was sane, but not as to whether or not he was conscious of his innocence. The request is based upon the ordinary conduct of sane men, and not of insane men. The seeking, of vindication for his own protection, of the good will and esteem of his fellow-men, the uncovering of his act at once, the courting of investigation of his conduct, the fear of consequences engendered by conscious guilt, and becoming a fugitive, are things that can not be predicated of an insane man.

The request was wholly irrelevant to the issue.

IX.

NINETEENTH ASSIGNMENT.

The nineteenth assignment is as follows:

> The court erred in refusing to give the following instruction, asked for by defendant's counsel:
>
> "The court instructs the jury, if the testimony discloses that at the time of doing the act charged the defendant was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he should be acquitted." (Rec., pp. 45, 46.)

The record does not show that this request was made. All of the requests are set out on pages 35–37.

The substance of this request was fully embodied in the charge as is shown in what is quoted under the sixth subdivision of this brief.

X.

TWENTIETH ASSIGNMENT.

The twentieth assignment is as follows:.

> The court erred in permitting witness A. H. Brown to testify as to what defendant stated as a witness in his own behalf on his trial before the United States commissioner, the testimony of said Brown being as follows, to wit:
>
> "That he was present at the trial by the United States commissioner; that the defendant was introduced as a witness in his own behalf, being first cautioned by the commissioner that he was not required to give evidence unless he desired to do so, and cautioned that he had better not say anything, because what he said could be used against him. After, then, being thus cautioned, the defendant was sworn as a witness and stated that he killed the deceased; that he had cleared up a little patch of cane, and there was no understanding, and he (defendant) made up his part, and Blackwell told him that if he did not make up his (Blackwell's) part he would kill him; that he (defendant) stayed in his house all day and night afraid to go out, and the next day he saw Blackwell picking cotton in the field and he slipped out and got a gun and shot him." (Rec., p. 46.)

The only ground of exception was "because the testimony taken before and by the said commissioner was written down, and that the record and written evidence

taken by said commissioner was the best evidence of the testimony and proceedings had before him." (Rec., p. 6.)

This was a confession made in the hearing of the witness, and the evidence given was primary and not secondary.

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